(1)

No. 91-547

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

KOREAN AIR LINES CO., LTD.,

Cross-Petitioner,

—v.—

PHILOMENA DOO[illegible]Y, *et al.*,

Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether trustworthiness objections to a public report offered in evidence under Federal Rule of Evidence 803(8)(C) go to the admissibility of the report or to the weight to be accorded the report by the jury once admitted?

2. Whether evaluative findings in a public report which are based upon "sources of information or other circumstances [which] indicate lack of trustworthiness" are admissible under Rule 803(8)(C)?

3. Whether the "sources of information" themselves which "indicate lack of trustworthiness" are admissible under Rule 803(8)(C)?

4. Whether the jury verdict that the shooting down of flight KE007 by Soviet military aircraft was proximately caused by the "wilful misconduct" of the flight crew of flight KE007 within the meaning of Article 25 of the Warsaw Convention was supported by properly admitted evidence?

PARTIES TO THE PROCEEDING BELOW

The parties before this Court and to the proceedings below are: Cross-Petitioner KOREAN AIR LINES CO., LTD. and the following Cross-Respondents:

	CROSS-RESPONDENT	DECEDENT
1.	Robert Boyar	Jan Moline
2.	Robert Boyar	Michael Truppin
3.	Mildred Burgess	James Burgess
4.	Philomena Dooley	Cecilio Chuapoco
5.	Julia Lombard	Aiden Lombard
6.	Maureen Lombard	Donald Lombard
7.	Kathryn McDonald	Lawrence McDonald
8.	William Cunningham	Kwang Woon Siow
9.	Gerald Metcalf	Chong Sun Metcalf
10.	Kimberly Saavedra	Ok Soon Chung
11.	Edward Ocampo	Suellen Ocampo
12.	Anne & David Powrie	Ian Powrie
13.	Kimberly Saavedra	Tomiko Kohno
14.	Kimberly Saavedra	Yooko Okai
15.	Kimberly Saavedra	Makoto Okai
16.	Kimberly Saavedra	Maskazu Yamaguchi
17.	Mayuree Siripoon	Jintana Siripoon
18.	Tery Weng	Ming Weng
19.	Sandra Yoon	Sung Boo Yoon
20.	Parvaneh Zareh	Darioush Zareh
21.	Eric Forman	Evelyn Forman
22.	Shirley Katz	Jack Katz
23.	In Jig Lin	San Mei Lin
24.	Marsha Maikovitch	Allen Kohn Lillian Kohn
25.	Nan Oldham	John Oldham
26.	Betty Lim	Jong Jin Lim
27.	Christina Ting	Shih Jen Ma
28.	Sara Swift	Frances Swift
29.	Kyung Hwa Park	Han Tae Park
30.	Lee Hee Sook	Eun Hyung Lee

	CROSS-RESPONDENT	DECEDENT
31.	Ul Ran Lim	Jong Chull Lim
32.	Eun Jung Oh	Anna Song
33.	Elia Baek	Yun Baek
34.	Yon Shen Liu	Yun Hsin Chung
35.	Chan Kung	Chin Fan Kung
36.	Yoh Shen Liu	Chao Po Liu
37.	Yoh Shen Liu	Hsuan Yun Hsin Chung
38.	Liu Tsuei Lee	Li-Cheng Lee
39.	Yueh Lan Liu	Yin Chien Liu
40.	Tzen Chang	Mason Chang
41.	Hsing Wang	Yun-Sheng Liu
42.	Chi Chin Lin	Ju-Yen Cheng
43.	Lih Hwa Chen	Chi-Tien
44.	Andi Donovan	Tsai Chen Chang
45.	Adhuk Homlaor	Tommy Homlaor Amporn Hansuwanpisit
46.	Diana Chao	Su-Jen Chan
47.	Diana Chao	Yee Shine Chan
48.	Thomas Mahalek	Muriel Kole
49.	Michael Kole	Muriel Kole
50.	Renay Bevins	Richard Bevins
51.	Maureen Oren	William Oren
52.	Sung Wha Yoo	Chung Soo Yoo
53.	Roberto Cruz	Alfredo Cruz
54.	Jwa Hong	Billy Hong
55.	Elisa A. Chan	Amado E. Chan
56.	Jose Bolante	Maria Bolante
57.	Jose Bolante	Eusebio Bolante
58.	William Stevens	Hiroko Stevens
59.	Elisa Chan	Joseph Chan
60.	Leo Fitzpatrick	Lillian Fitzpatrick
61.	Mo Hsiang Tsao	Yuen Che Tsao
62.	Robert Caltabeilatta	Mary Chuapoco

	CROSS-RESPONDENT	DECEDENT
63.	Robert Caltabellatta	Celita Chuapoco Philomena Dooley
64.	Jeung Yun	Ei Sik Yun
65.	David Wu Dunn	Sirena Wu Dunn
66.	Michael Jones	Margaret Zarif
67.	Lolita Dofredo	Cornelio Caser
68.	Richard Bowden	Eleanor Bissell
69.	Joann Dunn	Susan Campbell
70.	Rodolfo Cruz	Edgardo Cruz Francisca Cruz
71.	Rep. Bank of NY	Brenda Galang
72.	Daisy Bickell	Edna Miller
73.	Shan Leung	Chi Man Leung
74.	Akemi Hummerstein	Lune Shiiki
75.	Akemi Hammerstein	Shidue Shiiki
76.	Lenore Lebow	Diane Ariyadej Sammy Ariyadej
77.	Erlinda Alora	Anita Bayona
78.	Rosario Bayona	Lilia Bayona Anita Bayona
79.	Felino Bayona	Lilia Bayona Anita Bayona
80.	Alexander Alcabasa	Lilia Bayona
81.	Maria Beirn	James Beirn
82.	Robert Speir	Kathy Brown Speir
83.	Dorothy Jones	Joyce Chambers
84.	Hans Ephraimson-Abt	Alice Ephraimson-Abt
85.	Antonio Guevara	Angelita Guevara Tara Guevara
86.	Kimberly Saavedra	Yon Pyo Lee
87.	Kimberly Saavedra	Jan Hjalmarsson
88.	Indep Inc.	Claim for Destruction and Loss of Property
89.	Willie James	Hazel James
90.	Kimberly Saavedra	Hiroaki Kawana

	CROSS-RESPONDENT	DECEDENT
91.	Kimberly Saavedra	Chung Yeung Kim
92.	Chong Cha Kim	Jin Hong Kim
93.	Marjorie Zickerman	Murial Kole
94.	Emelinda Lantin	Raymondo Lantin
95.	Marie Lombard Gill Jennifer Lombard	Aiden Lombard
96.	Kimberly Saavedra	Sayuri Mano
97.	Louisa Nassief	Anthony Nassief
98.	Charles Fonville	Jessie Slaton
99.	Wang-Huey	Cheng-Liu Yeh Ping Yeh
100.	Robert Boyar	Jan Moline *et al.*
101.	Soon Hi Choi Lee	Yun Pyo Lee

Other defendants which appeared in the district court are the United States of America, The Boeing Company, Litton Systems, Inc. and Jeppesen Sanderson, Inc. These defendants are not before the Court and were not parties to the proceedings in the court below.

RULE 29.1 LIST

Korean Air Lines Co., Ltd. is a member of The Hanjin Group of Korea, which comprises companies under common management direction. The 24 affiliated companies of The Hanjin Group are:

Hanjin Transportation Co., Ltd.
Hanil Development Co., Ltd.
Hanjin Shipping Co., Ltd.
Jungsuk Enterprise Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Air Korea Co., Ltd.
Jedong Industries, Ltd.
Hanjin Travel Service Co., Ltd.
Hanjin Construction Co., Ltd.
Korea Freight Transportation Co., Ltd.
Korea Travel Information Service Co., Ltd.
Hanil Leisure Co., Ltd.
Hanjin Information Systems & Telecommunication Co., Ltd.
Pyung Hae Mining Development Co., Ltd.
Cheju Mineral Water Co., Ltd.
Union Express, Ltd., Co., Ltd.
Hanjin Heavy Industries Co., Ltd.
Femtco Shipping Co., Ltd.
Oriental Fire & Marine Insurance Co., Ltd.
Korean French Banking Corporation—SOGEKO
Hanjin Investment & Securities Co., Ltd.
Inha University Foundation
Jungsuk Foundation
Inha General Hospital

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CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Cross-Petitioner, KOREAN AIR LINES CO., LTD. (hereinafter KAL), respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-captioned proceeding on May 7, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 932 F.2d 1475, and is reprinted in the Appendix hereto at 1a, *infra*.[1]

The unreported bench rulings, during trial, of the United States District Court for the District of Columbia (Robinson, C.J.), are reprinted in the Appendix hereto at 51a, *infra*.

1 References which are in the form "App. at ___" are to the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 7, 1991. The Court of Appeals denied a timely petition for rehearing by Order dated July 5, 1991. The Order denying the petition for rehearing is reprinted in the Appendix hereto at 90a, *infra*. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). This cross-petition is not conditional on the petition for writ of certiorari of the Cross-Respondents filed on August 6, 1991.

STATUTORY AND TREATY PROVISIONS INVOLVED

The Federal Rule of Evidence involved is Rule 803(8)(C), which provides:

> **Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial**
>
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed. R. Evid. 803(8)(C).

The provision of the Warsaw Convention involved is Article 25(1), which provides:

> The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance

with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

40 Stat. 3020.

STATEMENT OF THE CASE

On September 1, 1983, a Soviet fighter aircraft deliberately fired upon and destroyed a civilian aircraft operating as KAL flight KE007 from New York via Anchorage to Seoul, Korea. All 269 passengers and crew on board the aircraft were killed. On September 28, 1983, the Congress of the United States, by joint resolution, condemned:

> the Soviet crime of destroying Korean Air Lines flight 7 and murdering the two hundred and sixty-nine innocent people on board . . .

Pub. Law 98-98, 97 Stat. 715 (Sept. 28, 1983).

On March 6, 1984, the Council of the International Civil Aviation Organization (ICAO)[2] adopted a Resolution reading, in part:

> THE COUNCIL,
>
> * * *
>
> *HAVING CONSIDERED* the report of the investigation by the Secretary General and the subsequent technical review by the Air Navigation Commission;
>
> *RECOGNIZING* that, although this investigation was unable, because of lack of necessary data, to determine conclusively the precise cause for the serious deviation of some 500 kilometers from its flight plan route by the Korean aircraft into the airspace above the territory

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2 ICAO is a public international organization with over 160 Contracting States established by the Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 (Chicago Convention). The governing body of ICAO, the Council, is composed of 33 Contracting States. Chicago Convention, Art. 50(a), 61 Stat. 1195. The Secretary General is appointed by and reports to the Council. Chicago Convention, Art. 54(h), 61 Stat. 1196.

> under the sovereignty of the Soviet Union, no evidence was found to indicate that the deviation was premeditated or that the crew was at any time aware of the flight's deviation;
>
> * * *
>
> *CONDEMNS* the use of armed force which resulted in the destruction of the Korean airliner and the tragic loss of 269 lives;
>
> *DEEPLY DEPLORES* the Soviet failure to cooperate in the search and rescue efforts of other involved States and the Soviet failure to cooperate with the ICAO investigation of the incident by refusing to accept the visit of the investigation team appointed by the Secretary General and by failing so far to provide the Secretary General with information relevant to the investigation.

ICAO Council Resolution of 6 March 1984, reprinted in Minutes of ICAO Council, 111th Sess., Montreal, 1 Feb.—30 Mar. 1984, Doc. 9441-C/1081, C-Min. 111/6 (1984) [1984 Minutes] at 106.

At a liability trial in the District Court for the District of Columbia, the trial court allowed into evidence, over the objection of KAL, the report of the investigation by the Secretary General of ICAO,[3] which relied upon and included as an appendix materials furnished by the Soviet government. On the basis of this report and the testimony of two pilot expert witnesses also based on the report, a jury found that "the flight crew of KOREAN AIR LINES Flight No. KE007 committed 'wilful misconduct' " and that "the 'wilful misconduct' of the flight crew of KOREAN AIR LINES Flight No. 007 was a proximate cause of the shootdown by the Soviet military".[4]

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3 ICAO Secretary General's Report on the Destruction of KAL B-747 on 1 Sept. 1983 (Dec. 1983). For convenience of reference, this report is referred to herein and in the courts below as the ICAO Report.

4 The Judgment on the Verdict of the jury is reprinted in the Appendix hereto at 91a, *infra*. KAL appealed the judgment entered on the verdict to the court below pursuant to 28 U.S.C. § 1291.

1. The Nature of the Case

This multidistrict litigation involves over 100 death actions brought against KAL by representatives of passengers killed when flight KE007 was deliberately fired upon and destroyed by Soviet military aircraft on September 1, 1983. All of the actions but one are governed by the Warsaw Convention,[5] as supplemented by the Montreal Agreement,[6] which together limit KAL's liability to the sum of $75,000 per passenger, unless the destruction of flight KE007 by Soviet military aircraft was proximately caused by the "wilful misconduct" of KAL or its employees within the meaning of Article 25 of the Convention.

2. The Investigation of the KE007 Shootdown

In the aftermath of the Soviet shootdown of flight KE007, the Soviets attempted to justify their action by asserting that KE007 was a spy plane and that the course deviation was the "result of the deliberate and premeditated action of the crew" arranged by the "intelligence services of the United States."[7] Suspicious of this explanation and in view of the political issues involved, the ICAO Council, on September 16, 1983, adopted a special resolution directing the Secretary General of ICAO to institute an investigation of the shoot-

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5 Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. App. § 1502 (Warsaw Convention).

6 Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, note following 49 U.S.C. App. § 1502 (approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302) (Montreal Agreement).

7 Preliminary Information on the Progress of the USSR Investigation into the Accident to a South Korean Aeroplane on 1 Sept. 1983 (Nov. 1983) [Preliminary Soviet Report] at ¶¶ 3.1.1, 3.1.2, attached as Appendix "F" to the ICAO Report; Minutes of ICAO Council, Extraordinary Sess., Montreal, 15-16 Sept. 1983, Doc. 9416-C/1077, C-Min. Extraordinary 1-4 (1983) at 38-42.

down.[8] A special resolution was necessary because, pursuant to Article 26 of the Chicago Convention, neither the Secretary General nor ICAO investigates civil aircraft accidents; such investigations are left exclusively to the appropriate member States. Chicago Convention, Art. 26, 61 Stat. 1187.

The Soviets, refusing to recognize the legal authority of ICAO to conduct an investigation, claimed to have instituted their own investigation into the shootdown and subsequently delivered to ICAO the Preliminary Soviet Report (Appendix "F" to the ICAO Report), which embodied the Soviet government spy theory. ICAO Council Working Paper C-WP/7764 (Dec. 12, 1983) [Working Paper] at 2. The Soviets submitted to ICAO, and included in their version of the investigation, a partial flight path, known as the "Russian line,"[9] for an unidentified "intruder aircraft". ICAO Report at 41-43, 46; Preliminary Soviet Report at ¶ 2.5, F-16, F-17. Neither the sources of the information contained in the Preliminary Soviet Report nor the data used to create the "Russian line" ever was given to the Secretary General of ICAO.[10] The Secretary General merely accepted all submitted information, including the Preliminary Soviet Report and the "Russian line", and their "authenticity was not questioned." 1984 Minutes at 17, 37, 55-56. Although the ICAO investigators did not find as a fact or verify that the "Russian line" was the flight path of flight KE007, the ICAO investigators used the "Russian line" as a "working assumption" for their investigation and postulated six hypothetical flight path scenarios in an attempt to explain how the aircraft might have flown along the "Russian line," if indeed it did, a fact which

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8 ICAO Council Resolution of 16 Sept. 1983, reprinted in Action of the ICAO Council, Extraordinary Sess., Montreal, 15-16 Sept. 1983, 110th Sess., Doc. 9428-C/1079 [Action of ICAO Council] at 21-22.

9 The "Russian line" was depicted as a thick black line on plaintiffs' trial Exhibit 407. Exhibit 407b, a smaller version of Exhibit 407, is reprinted in the Appendix hereto at 92a, *infra*.

10 Working Paper at ¶ 2.9; Minutes of ICAO Council, 110th Sess., Montreal, 14 Oct.–16 Dec. 1983, Doc. 9427-C/1078, C-Min./1-20 [1983 Minutes] at 148-51, 170.

the investigators could not determine. ICAO Report at 44-54. The ICAO Report found that only two out of the six scenarios were "possible explanations" for flight KE007's assumed course deviation. ICAO Report at 52, 54-56.

The Secretary General presented his report to the ICAO Council on December 2, 1983, with the explicit proviso that "a number of elements were missing from the report and if these became available a supplementary report would be prepared." Action of ICAO Council at 26; 1983 Minutes at 148-9; Working Paper at ¶ 2.8. The Report stated that, due to the unavailability of the flight data and cockpit voice recorders and other significant instrumentation and evidence:

> the investigative effort was compelled to proceed on the basis of limited hard evidence and facts, circumstantial evidence, assumptions and calculations and to base some of its key findings on postulated and then simulated, most-likely scenarios of what may have transpired.

ICAO Report at 2. Of significance, the ICAO Report concluded that the flight crew of KE007 was not aware of any course deviation or interception attempts by the Soviet fighter aircraft. ICAO Report at 2, 55-56.

After extensive debate, the ICAO Council deferred voting on whether to endorse the ICAO Report in order to have the Report reviewed by the Air Navigation Commission (ANC)[11] of ICAO. 1983 Minutes at 148-172. The ANC reported on February 16, 1984 that the ICAO Report "was incomplete and contained contradictory elements, so that assumptions were made in order to explain facts." 1984 Minutes at 17. The ANC "found it difficult to validate and endorse the conclusions connected with the scenarios postulated in the Secretary General's report because any one of them contained

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11 The ANC is the technical body of ICAO that develops the Standards and Recommended Practices in the Annexes to the Chicago Convention. Chicago Convention, Arts. 56 & 57, 61 Stat. 1197-1198. The ANC is composed of 15 members who have "suitable qualifications and experience in the science and practice of aeronautics". Chicago Convention, Art. 56, 61 Stat. 1197-1198.

some points which could not be explained satisfactorily." 1818th Report to Council by the President of the Air Navigation Commission, C-WP/7809 (Feb. 16, 1984) [ANC Report] at ¶ 5.1.

After detailed consideration of the ICAO Report and the ANC Report, *the ICAO Council, including the United States, refused to endorse the ICAO Report.* 1984 Minutes at 27-104. Thus, the ICAO Report *never* was adopted by the ICAO Council, the public body/agency for which it was prepared by the Secretary General.

3. The Trial in the District Court

At trial, plaintiffs attempted to establish "wilful misconduct" on the part of the flight crew of flight KE007 by theorizing that, due to a misprogramming of the Inertial Navigation System (INS)[12] prior to departure from Anchorage, the aircraft deviated from course as soon as it departed Anchorage and thereafter proceeded along a theoretical flight path which took the aircraft into Soviet airspace. Plaintiffs theorized further that the KE007 flight crew knew that the INS had been misprogrammed and that the aircraft was off course before leaving Alaska. Plaintiffs argued that the crew nevertheless decided to proceed to Seoul with full knowledge of the obvious danger to themselves and their passengers of being off course and making an unauthorized flight through highly sensitive military Soviet territory.

Plaintiffs introduced as evidence, over the objection of KAL, the Report of the Secretary General of ICAO, the Preliminary Soviet Report, the "Russian line"[13] and the "expert

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12 The INS is a navigational device which stores flight plans of up to nine route waypoints. The INS displays, among other data, present position, waypoint positions, distance and time to next waypoints and waypoint numbers establishing present course. KE007 was equipped with three INS units.

13 Prior to trial, KAL filed a motion *in limine* to exclude as untrustworthy and inadmissible hearsay the ICAO Report and the Preliminary Soviet Report, including the "Russian line." During oral argument on

testimony" of two pilots who based their opinions almost entirely on the ICAO Report and the "Russian line".

On August 2, 1989, the jury returned a verdict that the deliberate shootdown of flight KE007 by Soviet military aircraft and the deaths of all on board were proximately caused by the "wilful misconduct" of the flight crew of flight KE007. App. at 91a. Subsequently, based upon a further instruction of the trial court, the same jury assessed punitive damages against KAL in the amount of $50,000,000. App. at 91a.

4. The Decision of the Court of Appeals

The Court of Appeals set aside the punitive damage award, holding that the Warsaw Convention does not permit the recovery of punitive damages. App. at 18a-30a, 932 F.2d at 1484-90. That portion of the decision and judgment of the Court of Appeals is the subject of a petition for certiorari filed by Cross-Respondents herein.

The portion of the opinion and decision of the Court of Appeals affirming the admission into evidence of the ICAO Report, the Preliminary Soviet Report and the "Russian line", under Rule 803(8)(C) of the Federal Rules of Evidence, and the jury verdict of "wilful misconduct" is the subject of this cross-petition. App. at 6a-15a, 932 F.2d at 1479-83.

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the motion, KAL stated that it had no objection to the factual portions of the ICAO Report but reasserted its objections to any part of the ICAO Report based upon the "Russian line" and also to the Preliminary Soviet Report. App. at 61a-63a. On the second day of the trial, the trial court denied KAL's motion and admitted the ICAO Report and the Preliminary Soviet Report, including the "Russian line", in their entirety, over the objections of KAL. App. at 84a-89a.

REASONS FOR GRANTING THE CROSS-PETITION

Rule 803(8)(C) of the Federal Rules of Evidence is one of the most complex and controversial evidence rules. It has resulted in inconsistent rulings from the date of its adoption. In *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988), the Court resolved one principal cause for inconsistent rulings on the scope of Rule 803(8)(C)—whether conclusions and opinions in public evaluative reports can be considered to be "factual findings" admissible under Rule 803(8)(C). This case presents the second principal cause for inconsistent rulings in the application of Rule 803(8)(C): whether and to what extent a report should be excluded because "the sources of information or other circumstances indicate lack of trustworthiness" and whether trustworthiness considerations go to admissibility or the weight to be given the report by the jury. The decision of the Court of Appeals below on this trustworthiness determination is in conflict with *Palmer v. Hoffman*, 318 U.S. 109 (1943), *Federal Deposit Ins. Corp. v. Mmahat*, 907 F.2d 546 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1387 (1991), *Faries v. Atlas Truck Body Mfg.*, 797 F.2d 619 (8th Cir. 1986), *Bright v. Firestone Tire & Rubber Co.*, 756 F.2d 19 (6th Cir. 1984), *City of New York v. Pullman Inc.*, 662 F.2d 910 (2d Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982), *McKinnon v. Skil Corp.*, 638 F.2d 270 (1st Cir. 1981), *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632 (3d Cir. 1977) and *Franklin v. Skelly Oil Co.*, 141 F.2d 568 (10th Cir. 1944). *See* Grossman & Shapiro, *The Admission of Government Fact Findings Under Federal Rule of Evidence 803(8)(C): Limiting the Dangers of Unreliable Hearsay*, 38 Kans. L. Rev. 767 (1990) [hereinafter *Government Fact Findings*], detailing the various conflicts and disarray among the courts in the application of Rule 803(8)(C).

The Court of Appeals has sanctioned a jury verdict based on possibilities, surmise and conjecture derived from the admission into evidence of the ICAO Report, the Preliminary Soviet Report and the "Russian line". Rather than applying a trustworthiness analysis to the ICAO Report and to its

principal "sources of information," the Preliminary Soviet Report and the "Russian line", the Court of Appeals has endorsed a let-it-all-in philosophy, relegating KAL's trustworthiness objections to a matter of weight for the jury and not admissibility. This approach to admissibility is a fundamental departure from the judicial role of filtering for jury consideration only materials and testimony having evidentiary value and is an approach which is directly contrary to the purpose and language of Rule 803(8)(C). The lower courts in this case have so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of the Court's power of supervision. The proper application of the trustworthiness requirement of Rule 803(8)(C) is a recurring problem which warrants the Court's intervention to ensure uniformity in the application of the Rule.

I

THE COURT OF APPEALS' APPLICATION OF RULE 803(8)(C) DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL

The issue presented in this case is whether trial courts are required to scrutinize the "sources of information" upon which a public evaluative investigation report is based and exclude the report, or portions thereof, to the extent the "sources of information or other circumstances indicate lack of trustworthiness".

The court below held that the following reports were properly admissible pursuant to Rule 803(8)(C), even though the sources of information were patently untrustworthy:

1. *The Preliminary Soviet Report*—This Report was presented by the Soviet government to the Secretary General of ICAO pending completion of the Soviet investigation of the shootdown. The Preliminary Soviet Report stated that flight KE007 was on a spy mission arranged by the intelligence services of the United States. In support of this assertion, the Report contained a flight path (known as the "Russian line")

of an unidentified "intruder aircraft" allegedly derived from Soviet radar. The source of the plot is unknown and no radar recording or data ever was supplied to verify this "Russian line".

2. *The ICAO Report*—This Report was prepared by the Secretary General of ICAO at the direction of the ICAO Council. The ICAO Council declined to adopt or endorse this Report. The Preliminary Soviet Report was attached to the ICAO Report as an Appendix and the "Russian line" was included in the ICAO Report and used as the basis for developing six *possible* scenarios and arriving at various hypotheses as to what may have happened to explain each scenario.

The Court of Appeals concluded that the failure of the ICAO Council to approve or endorse the ICAO Report did not affect its admissibility and the fact that the ICAO Report was "inconclusive" and "based on very limited hard evidence", did not alone undermine its finality or trustworthiness. App. at 8a, 13a. The Court of Appeals further concluded that "[s]tanding alone, we doubt that the Soviet report would have been admissible under Rule 803(8)(C), but its inclusion as an appendix to the ICAO Report would not automatically render the Secretary General's otherwise admissible report objectionable." App. at 13a. The court below held that the use by ICAO of the "uncorroborated" Russian line and its inclusion in the ICAO Report did not render any portions of the ICAO Report based thereon untrustworthy. App. at 13a-14a.

In overruling KAL's objections to the ICAO Report, the Preliminary Soviet Report and the "Russian line", the trial court merely stated:

> [I]t goes to the weight of it. It is not worth the paper it is written on, and that does not make it untrustworthy in the legal sense. That is . . . a factual determination . . . that this jury will make.

App. at 88a. The court below approved the trial court's ruling that "KAL's trustworthiness objections were more prop-

erly addressed to the jury for purposes of evaluating the weight to be accorded the Secretary General's conclusions". App. at 14a.

In this, the court below erred and placed itself in conflict with other circuit courts of appeal on the necessity of a trustworthy analysis, both as to the report and the sources of information, by the trial court, before admissibility can be considered under Rule 803(8)(C). In its trustworthy analysis, the trial court must, of necessity, consider the sources of the information for the report, and if these sources are untrustworthy, the report must be excluded, as the Court held in *Palmer v. Hoffman*, 318 U.S. 109 (1943). *See Federal Deposit Ins. Corp. v. Mmahat*, 907 F.2d 546 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1387 (1991); *Faries v. Atlas Truck Body Mfg.*, 797 F.2d 619 (8th Cir. 1986); *Bright v. Firestone Tire & Rubber Co.*, 756 F.2d 19 (6th Cir. 1984); *City of New York v. Pullman Inc.*, 662 F.2d 910 (2d Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982); *McKinnon v. Skil Corp.*, 638 F.2d 270 (1st Cir. 1981); *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632 (3d Cir. 1977); *Franklin v. Skelly Oil Co.*, 141 F.2d 568 (10th Cir. 1944). *See also Drummond v. ALIA—The Royal Jordanian Airline Corp.*, 11 Fed. R. Evid. Serv. 1904 (W.D. Pa. 1982).

II

REVIEW IS NECESSARY TO END CONFLICT AND CONFUSION AMONG THE LOWER COURTS OVER THE TRUSTWORTHINESS REQUIREMENT OF RULE 803(8)(C)

Rule 803(8)(C) expressly states that evaluative reports are not admissible if "the *sources of information* or other circumstances indicate lack of trustworthiness." (emphasis added). This is because the trustworthiness of a factual finding or conclusion rests on the trustworthiness of the information upon which the finding or conclusion is based. *See McKinnon*, 638 F.2d at 273. As explained by Judge Harold

Greene in his oft cited decision of *United States v. American Tel. & Tel.*, 498 F. Supp. 353 (D.D.C. 1980):

> The rationale for the admissibility of factual findings contained in public records . . . lies in their fundamental trustworthiness. The guarantee of trustworthiness does not necessarily reside in the contents of the records, be they facts or conclusions, but rather in their source.

498 F. Supp. at 360 (citation and footnote omitted).

The threshold question that must be addressed by the trial court when a report is offered into evidence under Rule 803(8)(C) is whether the proffered report sets forth "factual findings" resulting from "an investigation made pursuant to authority granted by law." Fed. R. Evid. 803(8)(C). Once the court has made this determination,[14] the focus of the court must then be on whether the "sources of information or other circumstances indicate lack of trustworthiness" so as to preclude the admission of the report. *See, e.g., Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613, 618 (8th Cir. 1983). Therefore, evaluative public reports, or portions thereof, which are based on inadmissible hearsay, are not admissible under Rule 803(8)(C) if the underlying sources of information or other circumstances are not trustworthy. *See Palmer*, 318 U.S. 109; *Faries*, 797 F.2d at 623; *Bright*, 756 F.2d at 21-22; *Pullman*, 662 F.2d at 915; *Dallas & Mavis Forwarding Co. v. Stegall*, 659 F.2d 721, 722 (6th Cir. 1981); *McKinnon*, 638 F.2d at 278-79; *McShain*, 563 F.2d at 636; *see also Drummond*, 11 Fed. R. Evid. Serv. 1904.

The Court in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988), recognized that the "trustworthiness inquiry [is the] . . . primary safeguard against the admission of unreliable evidence" and "applies to all elements of the report."

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14 The court below rejected KAL's argument that because the ICAO Report was never adopted or endorsed by the ICAO Council, the body for which the report was prepared, and was subject to supplementation, it did not satisfy the "factual findings" requirement. App. at 11a-13a.

Rainey, 488 U.S. at 167. Although the Court in *Rainey* did not reach or determine the question of how the factors listed in the Advisory Committee Notes to Rule 803(8)(C)[15] are to be applied in conducting the required trustworthy analysis, the Court did hold that:

> [T]he trustworthiness provision requires *the court* to make a determination as to whether the report, or any portion thereof, is sufficiently trustworthy to be admitted.

Rainey, 488 U.S. at 169 (emphasis added). Thus, a trial court has the "obligation, to exclude an entire report or portions thereof" that are determined to be untrustworthy. *Rainey*, 488 U.S. at 167.

While the lower courts agree that a trustworthiness analysis is required by Rule 803(8)(C), they are in disarray and have rendered inconsistent rulings interpreting and applying the Advisory Committee trustworthiness factors. "Some courts pay only lip service to the advisory committee's factors, some courts add to them, and every court seems to have its own understanding of what the factors mean." *Government Fact Findings*, 38 Kans. L. Rev. at 787-88 (footnotes omitted). This confusion has led to numerous conflicts among the lower courts as to the application and effect of the trustworthiness requirements of Rule 803(8)(C).

The court below, although noting the necessity for a trustworthiness inquiry, not only failed to address the trustworthiness factors but ignored positive indicia of untrustworthiness in the admitted Reports, the "sources of information" and the "circumstances" in which they were prepared. A proper consideration of these factors by the trial court would have mandated the exclusion from evidence of the ICAO Report, the Preliminary Soviet Report and the "Russian line".

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15 The non-exclusive factors listed in the Advisory Committee Notes to Rule 803(8)(C) are: the timeliness of the investigation, the investigator's skill or experience, whether a hearing was held and possible motivational problems or bias. *See Rainey*, 488 U.S. at 167 n.11.

1. In applying the motivation or bias factor, some courts ignore the apparent bias of the source of the information by assuming that public officials in making the report will consider possible bias of the source before relying on and incorporating such information in a report. *See Robbins v. Whelan*, 653 F.2d 47, 52 (1st Cir.), *cert. denied*, 454 U.S. 1123 (1981); *Perrin v. Anderson*, 784 F.2d 1040, 1047 (10th Cir. 1986); *Diaz v. United States*, 655 F. Supp. 411, 417 (E.D. Va. 1987). Other courts merely hold that this factor goes to weight and not to admissibility. *See Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300, 1306-07 (5th Cir. 1991); *Perrin*, 784 F.2d at 1047; *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 558-59 (6th Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on November 15, 1987*, 720 F. Supp. 1493, 1498 (D. Colo. 1989). One court has even interpreted this factor as only applying to the preparer of the report but not to the sources of the information contained in the report. *See Elcona Homes*, 588 F.2d at 558.

These approaches ignore the express language of Rule 803(8)(C)[16] and the thrust of the Court's holding in *Palmer v. Hoffman*, 318 U.S. 109 (1943), the principal case considered by the drafters of Rule 803(8)(C) concerning the requirement that the report and its sources of information be trustworthy. *Palmer* involved a railroad crossing accident in which plaintiff's decedent was killed. The railroad sought to introduce into evidence an accident report prepared by its engineer which recorded his version of the accident. The Court held that, in view of the engineer's possible motive in preparing his version of what happened, the report was inadmissible as untrustworthy. The *Palmer* report, as noted by the Second Circuit, was "dripping with motivations to misrepresent."[17] *See Faries*, 797 F.2d at 622-23; *Bright*, 756 F.2d at 22; *Pull-*

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16 The wording of Rule 803(8)(C) expressly requires that *the court* must examine the trustworthiness of the sources of information and not rely on the government official for this determination.

17 *Hoffman v. Palmer*, 129 F.2d 976, 991 (2d Cir. 1942), *aff'd*, 318 U.S. 109 (1943).

man, 662 F.2d at 915; *McKinnon*, 638 F.2d at 278-79; *Dallas & Mavis*, 659 F.2d at 722; *McShain*, 563 F.2d at 636; *Drummond*, 11 Fed. R. Evid. Serv. at 1909-10.

In the case at bar, the principal source of information which formed the basis for the ICAO Report's hypothesized findings was the "Russian line". The "Russian line" was the Soviet government's contention about KE007's flight path through Soviet airspace, as recorded on Soviet radar. The "Russian line", and the Preliminary Soviet Report which incorporated it, were prepared and presented to ICAO, without any authentication, verification or opportunity to question, by the very people who were responsible for the shootdown of flight KE007 and the deaths of the passengers and crew. Working Paper at ¶ 2.9; 1983 Minutes at 170; 1984 Minutes at 17, 37, 55-56. If the *Palmer* report was considered untrustworthy and therefore inadmissible in view of the employee/engineer's **possible** motivation when he wrote the report, it is incomprehensible that the self-serving Preliminary Soviet Report and "Russian line" of flight,[18] "dripping with motivations to misrepresent," and constructed to support the Soviet government's "spy plane" contention, and any portion of the ICAO Report which relied upon the Soviet information, could be considered trustworthy and admissible. Yet, the Court of Appeals upheld the trial court's decision to admit into evidence not only the findings of the ICAO Report based on the "Russian line" but also the Preliminary Soviet Report and the "Russian line" themselves.[19] App. at 13a-15a. These were important "sources of information" which were obviously biased and inherently unreliable, thus

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18 The "Russian line" is akin to a transcript of a taped recording of a purported conversation. No court would admit a transcript of the conversation without the underlying taped recording being made available. *See United States v. Rembert*, 863 F.2d 1023 (D.C. Cir. 1988); *United States v. Rengifo*, 789 F.2d 975 (1st Cir. 1986); *see also United States v. Romo*, 914 F.2d 889, 896 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1078 (1991); Fed. R. Evid. 901.

19 This decision conflicts with those cases which admit only the factual findings but not the hearsay upon which the findings are based unless the hearsay is within its own hearsay exception. *See infra* at 21-22.

rendering all parts of the ICAO Report relying thereon untrustworthy and inadmissible under Rule 803(8)(C).

2. Courts inconsistently apply the skill or experience factor of Rule 803(8)(C). Some courts view this factor as bearing on the weight to be given the report, rather than its admissibility. *See Ellis v. Int'l Playtex, Inc.*, 745 F.2d 292, 302-03 (4th Cir. 1984); *United States v. School Dist. of Ferndale*, 577 F.2d 1339, 1355 (6th Cir. 1978), *vacated on other grounds*, 616 F.2d 895 (6th Cir. 1980); *Diaz*, 655 F. Supp. at 417; *Sage v. Rockwell Int'l Corp.*, 477 F. Supp. 1205, 1209 (D.N.H. 1979). Still other courts properly view the lack of skill or experience as precluding admission. *See Jenkins v. Whittaker Corp.*, 785 F.2d 720, 726-25 (9th Cir. 1986); *Matthews v. Ashland Chemical, Inc.*, 770 F.2d 1303, 1310 (5th Cir. 1985); *Drummond*, 11 Fed. R. Evid. Serv. at 1909-10; *Fraley v. Rockwell Int'l Corp.*, 470 F. Supp. 1264, 1267 (S.D. Ohio 1979). The clearest examples of the collision of these opposite views are the decisions by the district courts in *Fraley* and *Sage* which addressed the admissibility of the same aircraft accident report. In *Fraley*, the court held that the report was not admissible because the investigator lacked experience. *Fraley*, 470 F. Supp. at 1267. The court in *Sage* admitted the same report, holding that the inexperience of the investigator affected the weight of the report and not its admissibility. *Sage*, 477 F. Supp. at 1209.

The skill and experience of the unidentified Soviet "investigators" is unknown and thus could not be evaluated. Yet, the starting point for the assumptions in the ICAO Report was the very information furnished by the Soviet government as its version of the flight path of the "intruder aircraft" which the ICAO investigators assumed was flight KE007.

The trial court did not address these issues and the Court of Appeals considered KAL's objections to bear on the weight to be given the reports and their sources by the jury and not on their admissibility. In so doing, the Court of Appeals and the trial court gave no consideration to the fact that the ICAO Report's conclusions based on the "Russian

line" were reviewed and specifically rejected by the ANC, the highest technical body of ICAO, and that the Report itself was *not adopted* by ICAO. ANC Report at ¶ 5.1; 1984 Minutes at 17.

3. Whether a hearing was held or the presence of procedural safeguards is extremely important to protect against the use of unreliable hearsay, especially where there has been no ability to cross-examine the sources or the maker of the report before or during trial. *See Pullman*, 662 F.2d at 915; *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816, 821 (10th Cir. 1981); *Skelly Oil*, 141 F.2d at 572; *Drummond*, 11 Fed. R. Evid. Serv. at 1909-10. Some courts, however, find this factor irrelevant or as bearing on weight where no hearing customarily is held prior to the findings being made in the report. *See In re Japanese Elec. Prods. Antitrust Litigation*, 723 F.2d 238, 268 (3d Cir. 1983), *rev'd on other grounds sub nom.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Elcona Homes*, 588 F.2d at 558.

Both the ICAO and Soviet investigations were conducted without any hearings or procedural safeguards. Moreover, the ICAO investigators made no effort to exclude unreliable hearsay, accepting *all* information provided by any interested party without any determination being made as to reliability or truthfulness. The ICAO Report's key working assumption as to the flight path of flight KE007 was based on the unauthenticated hearsay "Russian line", for which no corroborative data ever have been furnished. In this case, inadmissible hearsay does not merely predominate; it forms the entire basis for the ICAO Report's principal conclusions, rendering the Report itself untrustworthy and inadmissible. The court below did not address this factor.

4. In addition to the factors discussed above, numerous courts have adopted the "finality" of the factual findings as an element of trustworthiness. *See Gentile v. County of Suffolk*, 926 F.2d 142, 151 (2d Cir. 1991), *aff'g*, 129 F.R.D. 435 (E.D.N.Y. 1990); *In re Stapleton*, 720 F. Supp. at 1499. Other courts view "finality" as a threshold requirement to

admissibility and hold that reports prepared for, but never adopted or approved by the public agency for which prepared, or reports subject to revision or correction, do not satisfy the "factual findings" requirement of Rule 803(8)(C). *See Brown v. Sierra Nevada Memorial Miners Hospital*, 849 F.2d 1186 (9th Cir. 1988); *Pullman*, 662 F.2d at 914-15; *Pearce v. E.F. Hutton Group, Inc.*, 653 F. Supp. 810, 816 (D.D.C. 1987); *American Tel. & Tel.*, 498 F. Supp. at 367.

The ICAO Report remains subject to revision today and never was adopted or endorsed by the body for which it was prepared, the ICAO Council. The Preliminary Soviet Report was preliminary and incomplete. The court below did not consider these factors as precluding the admission of either report. App. at 12a-13a.

Despite the clear guidance furnished by the Advisory Committee Notes, the clear language of Rule 803(8)(C) and the ruling of *Rainey* that trustworthiness is **solely** for the court to determine, the Court of Appeals held that the trial court made a "threshold finding of trustworthiness" and properly left KAL's strong trustworthiness objections for the jury to weigh after admission. App. at 14a-15a. In this, the court below erred. Trustworthiness is not a matter of weight under the Rule; it is a matter of admissibility. *Rainey*, 488 U.S. at 169; *Palmer*, 318 U.S. at 114.

The Court of Appeals' decision sanctioning the trial court's ruling signals a radical departure from the intent of the drafters of Rule 803(8)(C) to allow the admission only of those public reports which are based on trustworthy sources of information and to exclude reports based on sources of information motivated to misrepresent. The decision of the court below will establish erroneous precedent affecting future cases and will perpetuate the conflict among the lower courts concerning the trustworthiness requirement of the Rule. The Court should grant certiorari to ensure that the lower courts when applying Rule 803(8)(C) will do so consistent with the intent of the drafters and the purpose of the Rule.

III

THE DECISION OF THE COURT BELOW RAISES RECURRING IMPORTANT AND UNRESOLVED QUESTIONS OF FEDERAL EVIDENTIARY LAW

The conflicting approaches to resolving questions of trustworthiness has resulted in inconsistent Rule 803(8)(C) rulings. In applying the Rule, courts have tried to accommodate two conflicting policies: the policy of allowing trustworthy public evaluative reports to be considered by the jury, although hearsay, and the general policy behind the exclusion of unreliable hearsay evidence. Courts have taken different approaches in attempting to reconcile these policies which has led to confusing and conflicting results.

Some courts hold that evaluative reports, or portions thereof, which are based on hearsay not independently admissible, are not admissible under Rule 803(8)(C) because the underlying sources of information cannot be considered trustworthy. *See Bright*, 756 F.2d at 22-23; *Miller v. Caterpillar Tractor Co.*, 697 F.2d 141, 144 (6th Cir. 1983); *Pullman*, 662 F.2d at 915; *McKinnon*, 638 F.2d at 278-79; *McShain*, 563 F.2d at 636.

Other courts interpret Rule 803(8)(C) as placing no restrictions on the sources of information relied upon in a report provided there is no demonstrated lack of trustworthiness in the sources. *See Ellis*, 745 F.2d at 302-03; *Robbins*, 653 F.2d at 51-52; *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir. 1978); *School Dist. of Ferndale*, 577 F.2d at 1354-55; *Wolf v. Procter & Gamble Co.*, 555 F. Supp. 613, 625 (D.N.J. 1982).

Courts also are unable to agree as to the extent to which the underlying hearsay sources of information used in a report are admissible. Some courts only admit the findings but not the hearsay upon which they are based unless the source has its own hearsay exception as required by Rule 805. *See Mmahat*, 907 F.2d at 551; *In re Paducah Towing Co.*, 692 F.2d 412, 420-21 (6th Cir. 1982); *Elcona Homes*, 588

F.2d at 559; *Budden v. United States*, 748 F. Supp. 1374, 1377-78 (D. Neb. 1990); *Ramrattan v. Burger King Corp.*, 656 F. Supp. 522, 530 (D. Md. 1987). Others admit both the findings and the hearsay sources if trustworthy even if not within a specific hearsay exception. *United States v. DeWater*, 846 F.2d 528, 530 (9th Cir. 1988); *Perrin*, 784 F.2d at 1047; *Ellis*, 745 F.2d at 302-03; *Robbins*, 653 F.2d at 50-51.

In this case, the trial court admitted not only the ICAO Report and findings based on inadmissible hearsay, the Preliminary Soviet Report and "Russian line", but also admitted these hearsay sources which lacked *any* indicia of reliability. The admission of this evidence is contrary to even the broadest construction of Rule 803(8)(C) adopted by any circuit.

Rule 803(8)(C) is one of the most important rules of evidence often invoked in actions arising out of aircrash disasters which have been the subject of public investigation and report. Used carefully, Rule 803(8)(C) can be of great assistance to litigants and trial courts, but without observing the safeguard of trustworthiness, the admission of a public report can result in extreme prejudice and unfairness, as in this case.[20] The ability for KAL to present evidence diminishing the weight of the ICAO Report and the "Russian line" was illusory because of the ostensibly "official" nature of the ICAO Report cloaked the Report with an "aura of special reliability and trustworthiness" which it did not have, and

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20 The admission into evidence of the "Russian line" and the ICAO Report provided the essential support for plaintiffs' theory of wilful misconduct. As the Court of Appeals acknowledged, plaintiffs' theory was "based in part upon the inconclusive ICAO Report" which filled the "causation gap," without which plaintiffs' claims could not be sustained and "may well have influenced [the jury's] willingness to believe plaintiffs' extrapolation [i.e., plaintiffs' hypothetical flight path]." Add. at 8a, 15a. Moreover, the Russian line was highlighted on plaintiffs' primary trial exhibit as a thick black line and was relied upon extensively by their expert pilot witnesses. *See* Add. at 92a. The improper admission of this evidence unfairly prejudiced the substantial rights of KAL and was not harmless error. *Williams v. U.S. Elevator Corp.*, 920 F.2d 1019 (D.C. Cir. 1990); *Rassoulpour v. Wash. Metro. Area Transit Auth.*, 826 F.2d 98 (D.C. Cir. 1987).

which could not be overcome.[21] *See Bright*, 756 F.2d at 23; *Pullman*, 662 F.2d at 915; *Pearce*, 653 F. Supp. at 816-17. Indeed, the ICAO Report and the "Russian line" were very appealing because they offered possible explanations where none could be found. The fundamental evidentiary flaw in the ICAO Report and the "Russian line", however, was that they were unreliable and untrustworthy and were based primarily upon Soviet "sources of information", which were unreliable and untrustworthy in the context of this tragedy, where the Soviet government was motivated to misrepresent in an effort to justify, in the eyes of the world, its unprovoked and murderous act.

The Federal Rules of Evidence were adopted to establish uniformity among the federal courts in evidentiary rulings. Rule 803(8)(C), as now applied, has resulted in inconsistent rulings and uncertainty of application. The Court, as the final arbiter of the Federal Rules of Evidence, should grant certiorari to provide definitive guidelines to end the recurring confusion and conflict among the lower courts in the application and effect of the trustworthiness analysis required by Rule 803(8)(C), which is at the heart of the error of the courts below.

IV

THE ADMITTED EVIDENCE WAS LEGALLY INSUFFICIENT TO ESTABLISH "WILFUL MISCONDUCT" WITHIN THE MEANING OF ARTICLE 25 OF THE WARSAW CONVENTION

"Wilful misconduct" under Article 25 of the Warsaw Convention requires proof that:

> [T]he wrongdoer must consciously be aware of his wrongdoing, *i.e.*, the actor must not only intend to do the act found to be wrongful but also must know that his conduct is wrongful; he or she must consciously be aware that his or her wrongdoing entails a probable risk

21 The court below also did not address KAL's Rule 403 objections.

of danger; and his or her wrongdoing must cause the injuries for which recovery is sought.

In re Korean Air Lines Disaster of Sept. 1, 1983, 704 F. Supp. 1135, 1136 (D.D.C 1988); *accord KLM v. Tuller*, 292 F.2d 775 (D.C. Cir.), *cert. denied*, 368 U.S. 921 (1961); *Grey v. American Airlines*, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956); *American Airlines v. Ulen*, 186 F.2d 529 (D.C. Cir. 1949).

Where and why KE007 deviated from its assigned route of flight remains a mystery. As the court below noted: "The flight recorders and most of the wreckage were never recovered, so the details of what happened remain a mystery" and the "hard evidence of what happened is sparse." App. at 5a, 7a. Nevertheless, the court below concluded that there was sufficient evidence to support the jury verdict of "wilful misconduct" on the basis of the "sparse" evidence, including the "inconclusive" ICAO Report, the untrustworthy Preliminary Soviet Report, the "Russian line" and opinion testimony of two expert pilot witnesses based on these reports. App. at 7a-8a, 13a-17a. In this the court below erred.

Even if the ICAO Report, the Preliminary Soviet Report and the "Russian line" were properly admitted, these reports offered nothing more than speculative theories as to possibilities of what might have happened and not "probabilities". This evidence offered by plaintiffs and relied upon by plaintiffs' experts to support their theories about the flight path of KE007 and causation does not rise to the required level of significantly probative evidence. *See Siegel v. Mazda Motor Corp.*, 878 F.2d 435, 437-39 (D.C. Cir. 1989); *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 829 (D.C. Cir. 1988), *cert. denied*, 110 S. Ct. 218 (1989); *Nichols Constr. v. Cessna Aircraft*, 808 F.2d 340, 346-47 (5th Cir. 1985); *Neely v. St. Paul Fire & Marine Ins. Co.*, 584 F.2d 341, 345-46 (9th Cir. 1978). Therefore, the issues of "wilful misconduct" and causation should not have been presented to the jury for decision.

CONCLUSION

For these reasons, the Cross-Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: October 2, 1991

APPENDIX

INDEX TO APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 25, 1991 Decided May 7, 1991

No. 89-5415

IN RE KOREAN AIR LINES DISASTER OF SEPTEMBER 1, 1983,
KOREAN AIR LINES COMPANY, LTD.,
APPELLANT

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 83-0345)

George N. Tompkins, Jr., with whom *Desmond T. Barry, Jr.* was on the brief, for appellant.

Steven R. Pounian, with whom *Milton G. Sincoff*, *Donald W. Madole* and *George E. Farrell* were on the brief, for appellees, Philomena Dooley and 136 others. *Juanita M. Madole* also entered an appearance for appellees.

Irene M. Solet and *Robert S. Greenspan*, Attorneys, Department of Justice, entered appearances for the Federal appellees.

Thomas J. McLaughlin and *Mary Rose Hughes* entered appearances for appellee The Boeing Company.

Before: MIKVA, *Chief Judge*, BUCKLEY and THOMAS, *Circuit Judges*.

Opinion for the court filed by *Chief Judge* MIKVA, except as to Part II(C).

Opinion for the court as to Part II(C) filed by *Circuit Judge* BUCKLEY.

Opinion dissenting in part filed by *Chief Judge* MIKVA.

MIKVA, *Chief Judge*: On September 1, 1983, a Korean Air Lines ("KAL") Boeing 747 airliner was shot down somewhere over the Sea of Japan by one of the Soviet Union's SU-15 interceptor aircraft, killing all 269 persons on board. The approximate crash site placed the flight more than 300 nautical miles off course and in Soviet airspace. Before trial, the district court granted summary judgment for the United States on claims that it had breached a duty to warn. *See In re Korean Air Lines Disaster of September 1, 1983*, 646 F. Supp. 30 (D.D.C. 1986). In an appeal brought by the unsuccessful plaintiffs in those cases, we upheld the district court's decision. *See Wyler, et al. v. Korean Air Lines, Inc., et al.*, No. 86-5400 (D.C. Cir. Mar. 29, 1991). Additional background on the disaster is provided in our opinion in the companion appeal.

In this case, KAL appeals from a judgment entered against it by the district court after a jury found KAL guilty of willful misconduct and awarded damages to a group of 137 plaintiffs; the award included $50 million in punitive damages. KAL challenges both the willful misconduct verdict and the assessment of punitive damages. Although KAL raises some valid concerns about the quality of the evidence submitted to the jury, we conclude that the finding of willful misconduct was permissible. However, we vacate the punitive damage award.

I. Background

On August 31, 1983, Korean Air Lines Flight 007 ("KE007") left New York's Kennedy Airport bound for Seoul, South Korea, with a stop in Anchorage, Alaska. After refueling there, KE007 took off from Anchorage International Airport at 1300 Greenwich Mean Time ("G.M.T."), or 4:00 a.m. local time. The Anchorage Air Traffic Control ("ATC") Center instructed KE007 to climb and maintain a flight level of 33,000 feet and "proceed direct BETHEL when able." BETHEL, located approximately 360 nautical miles west of Anchorage, is the navigational gateway for Route R20 of the North Pacific Composite Route System, which operates like a multi-lane highway for civilian flights across the Pacific Ocean between North America and Asia. BETHEL also serves as a navigational waypoint at which an airplane can cross-check its position against a radio fix. Route R20 has a series of navigational waypoints with precise geographical coordinates, each about 300 miles apart, that KE007 would follow on a direct path and use for course verification and reporting purposes. These waypoints were designated BETHEL, NABIE, NUKKS, NEEVA, NINNO, NIPPI, NYTIM, NOKKA and NOHO. *See* Map of the North Pacific (attached as an appendix to this opinion). Position reports from the crew to ATC ground controllers were required at BETHEL and other waypoints up through NIPPI, some 1800 miles from Anchorage. Anchorage ATC transfers control of aircraft following Route R20 to Tokyo Center at waypoint NIPPI.

At the time that these events took place, Anchorage ATC had radar coverage for less than half the distance to BETHEL. The Federal Aviation Administration's ("FAA") Kenai radar installation provided coverage as far as Cairn Mountain, approximately 165 nautical miles west of Anchorage. FAA radar surveillance was terminated at 1327:50 G.M.T. From that point on, Anchorage ATC would rely on the crew's position reports (calculated in-flight with the help of the waypoints and on-board systems) to track KE007's location and adherence to R20. At

1349 G.M.T., KE007's pilot reported reaching BETHEL and estimated that they would pass over their next reporting waypoint, NABIE, at 1430 G.M.T.

After BETHEL, KE007 did not have any direct communications with Anchorage ATC. During the remainder of the flight, the crew reported reaching each successive waypoint up to NIPPI, when Anchorage transferred control to Tokyo. These reports were relayed to Anchorage ATC by another KAL flight, KE015, which had departed Anchorage 14 minutes after KE007 and also was following Route R20. At NABIE, KE007 should have been able to communicate directly with Anchorage ATC through the St. Paul Island radio transmitter, but the crew was unable to do so, having instead to relay the report through KE015. KAL elicited testimony that this was not necessarily unusual and could be caused by weather. Plaintiffs countered that such a problem was rare, and they suggested that the direct broadcast was impossible because KE007 was already 90 miles off course at NABIE and out of the range of St. Paul Island's radio. This happened again at the next waypoint, NEEVA, where KE007 should have reported by using the Sheyma Island radio station. Evidently the pilot of KE015 became suspicious that something was wrong when KE007 requested that he relay this position report to Anchorage ATC, in part because KE007's time of arrival at that waypoint was nine minutes late and the explanation KE007's crew gave for the delayed arrival (strong headwinds) conflicted with his own observations just four minutes behind. Plaintiffs contended at trial that the inability to use the Sheyma Island radio station and the inconsistent headwind reports resulted from the fact that KE007 was now 170 miles off course and inside Soviet airspace.

After control of KE007 was transferred from Anchorage ATC, the crew reported to the controllers in Tokyo that they had reached NIPPI and estimated their time of arrival at NOKKA as 1826 G.M.T. A subsequent accident report concluded that the wind conditions reported by KE007 at NIPPI did not match those experienced on R20

and were more consistent with a position over 200 miles to the north-northwest over the Kamchatka Peninsula, U.S.S.R. The final direct transmission from the KE007 crew to ground controllers was a report to Tokyo at 1827:10 G.M.T. that the plane was rapidly decompressing and descending. The flight recorders and most of the wreckage were never recovered, so the details of what happened remain a mystery. However, contrary to KAL's suggestion, there was evidence from which to calculate an approximate crash site, including intermittent acoustic signals from an underwater flight recorder beacon received by search vessels in the area along with debris from the crash found in the Sea of Japan and washed ashore on Hokkaido Island.

Plaintiffs' liability claims in all of these actions grow from a hypothetical flight deviation that they claim was apparent on FAA radar shortly after take-off and could be extrapolated across the entire route to the approximate crash site in the Sea of Japan (after flying for about three hours in Soviet airspace and crossing over the Kamchatka Peninsula and Sakhalin Island). *See* Appendix. At trial, plaintiffs attempted to establish willful misconduct by the KE007 flight crew by theorizing that, due to an error in programming the Inertial Navigation System ("INS") prior to departure from Anchorage, KE007 deviated from its plotted course to Seoul and entered Soviet airspace. The INS is a navigational device which stores pre-programmed flight plans and displays data during the flight showing present position, waypoint positions, and any course deviations from the designated route. The INS units use gyroscopes to calculate positions during flight, and they must be programmed before takeoff by inserting the exact coordinates for latitude and longitude at the particular gate where the aircraft is parked.

At trial, plaintiffs contended that the crew must have known of the misprogramming either before leaving Anchorage or shortly thereafter, but decided to proceed rather than turn back and face possible disciplinary action such as suspension. Plaintiffs argue that the crew's loca-

tion reports were fabricated to cover up the error in programming. Furthermore, according to the plaintiffs, the crew must have been fully aware of the serious risk of straying into Soviet airspace, given that a similar KAL flight had been intercepted and forced down five years earlier. In 1978, KAL flight 902 had strayed deep into sensitive Soviet airspace near northern Europe, over 1000 miles off course. A Soviet fighter fired on the aircraft when it took evasive maneuvers, forcing an emergency landing on a frozen lake. This incident, which caused several fatalities, was evidently discussed in subsequent KAL training programs.

Plaintiffs' evidence consisted of radar reports covering the initial leg of KE007's flight, an investigative report completed by the Secretary General of the International Civil Aviation Organization ("ICAO") three months after the incident (hereinafter referred to as the "ICAO Report," although KAL emphasizes that it was never officially adopted by the ICAO Council), expert testimony from two pilots with extensive experience flying across the Pacific, and reports of prior unrelated incidents involving KAL navigation errors. At the close of plaintiffs' case, KAL moved unsuccessfully for a directed verdict. KAL then introduced the testimony of the air traffic controllers who monitored KE007 on radar and communicated with its crew, the testimony from the Deputy United States representative to ICAO and the report of the Air Navigation Commission ("ANC") of ICAO criticizing the Secretary General's Report. The jury returned a liability verdict against KAL, and in a subsequent verdict awarded plaintiffs $50 million in punitive damages. The trial judge entered judgment on the verdict and denied KAL's motion for judgment notwithstanding the verdict ("JNOV").

II. Analysis

On appeal, KAL argues (1) that there was insufficient evidence of willful misconduct to support the jury's verdict; (2) that several pieces of evidence used to prove will-

ful misconduct (the ICAO Report, the expert testimony based on that report, and the prior incidents) should not have been admitted; and (3) that the award of punitive damages was improper. We find merit in only the last of these contentions.

A. *Evidence of Willful Misconduct*

Initially, KAL contends that the district court's final jury instruction misstated the standard for willful misconduct. KAL requested a definition of willful misconduct as the "intentional performance of a wrongful act," but allegedly the court defined it only as the "intentional performance of an act." KAL has taken the actual instruction out of context:

> Willful misconduct is the intentional performance of an act with knowledge that the act will probably result in an injury or damage, or in some manner as to imply reckless disregard of the consequences of its performance.

This is precisely the formulation approved by this court in *KLM Royal Dutch Airlines v. Tuller*, 292 F.2d 775, 778 (D.C. Cir.), *cert. denied*, 368 U.S. 921 (1968).

KAL's primary argument on appeal is that there was no evidence from which a reasonable jury could find willful misconduct. Both sides mischaracterize what evidence was adduced at trial and for what purposes. In view of what was actually presented to the jury, we conclude that the evidence was not so one-sided that KAL was entitled to a JNOV or new trial. *Cf. In re Korean Air Lines Disaster of September 1, 1983*, 704 F. Supp. 1135, 1136-51 (D.D.C. 1988) (hereinafter "*In re KAL Disaster*") (detailing how each piece of plaintiffs' evidence could fit into the puzzle and what permissible inferences a jury might draw therefrom). The hard evidence of what happened is sparse: Anchorage radar showed that KE007's initial flight path was generally in the direction of waypoint BETHEL (though plaintiffs introduced additional radar evidence of a deviation appearing at this early stage in the flight), and wreckage was discovered in the Sea of Japan

shortly after a distress call from the crew. Although the exact crash site was never established, KAL does not deny that KE007 must have strayed hundreds of miles off course to end up in or near the Sea of Japan. The question is at what point did the flight go off course and why. Plaintiffs' theory, based in part upon the inconclusive ICAO Report, posits that the deviation was caused by an initial INS programming error that caused KE007 to stray progressively further off course during the flight. KAL emphasizes the flimsiness of this explanation but fails to offer one of its own; it contends that KE007 was on course throughout the flight across the Pacific until, for some entirely mysterious reason, it veered dramatically off course after waypoint NIPPI.

KAL argues that the radio transmissions from KE007's crew at each waypoint verify that they remained on course along Route R20. Plaintiffs respond by pointing to suspicious circumstances such as KE007's inability to communicate directly with air traffic control in Anchorage (having instead to relay its reports through KE015), and reporting wind conditions that were inconsistent with those encountered by KE015. KAL replies that the communications and reported wind conditions were in no way unusual, adding that these items could not provide evidence of the supposed course deviation. But all that plaintiffs were trying to prove at this point was that the uncorroborated reports from the crew were not persuasive evidence of their being on course. Plaintiffs suggested that the crew had a motive to lie because they knew they would face suspension if they admitted their error and turned back. A jury could legitimately discount the accuracy of those reports, in which case KAL's version of the probable flight path would be at least as speculative as plaintiffs' extrapolation. Given this lacuna, and the undisputed fact that the airliner was shot down hundreds of miles off course, a jury *could* credit plaintiffs' coherent theory of what happened, derived from circumstantial evidence such as the early radar reports of a mild course deviation before BETHEL and the arguably inconsistent wind reports.

A critical element in plaintiffs' scenario is evidence that a course deviation was evident as early as waypoint BETHEL that grew progressively larger during the flight. The FAA radar showed that halfway between Anchorage and BETHEL, KE007 was six miles north (to the right) of what would have been a direct heading toward the first waypoint. Military radar data from the uncertified though apparently accurate King Salmon station showed that KE007 was 12 miles north of a direct heading shortly before reaching BETHEL. Plaintiffs' witnesses interpreted this evidence as indicating a drift off course, extrapolating it to suggest at least a 12 mile deviation by the time KE007 passed BETHEL (well outside the 1-2 mile margin of error allowed). KAL argues that KE007 could proceed toward BETHEL any way it wanted (the ATC course clearance for R20 only applied once it left the coast after BETHEL), and being six miles off the most direct path at the half-way point and 12 miles off just before BETHEL would not justify an extrapolation of a 12 mile deviation at BETHEL. But plaintiffs introduced testimony that the flight would have reappeared on radar if it had suddenly turned directly toward BETHEL. A jury could reasonably believe plaintiffs' explanation of a deviation at BETHEL rather than KAL's evidence to the contrary, *see In re KAL Disaster*, 704 F. Supp. at 1138, 1142, and then extrapolate that deviation across the entire flight to the approximate crash site, just as juries are normally permitted to draw conclusions from less than complete direct evidence of what happened. This is not simply a case where the district court let the jury choose, on the basis of mere speculation and conjecture, between hypothetical scenarios of what happened. *Contrast Siegel v. Mazda Motor Corp.*, 878 F.2d 435, 437-39 (D.C. Cir. 1989) ("When the record thus contains competing, unrebutted hypotheses consistent with driver error [rather than a mechanical defect in the transmission] . . . we can discern no basis upon which to say that any one of the possible explanations is "more probable" than the others.").

Contrary to KAL's suggestion, plaintiffs did not simply use the flight path postulated by the ICAO Report and

based on the Soviet version of the intercept. Even if this aspect of the ICAO Report was arguably unreliable, a jury could make its own evaluation based upon the evidence supplied by plaintiffs and then accept the ICAO conclusions of possible causes drawn from the assumed flight path. Once the jury accepted plaintiffs' extrapolated path, the question becomes why the crew did nothing to correct the error. Because the flight recorder was never recovered, we only know that the crew claimed throughout the flight that they were on course. As explained above, plaintiffs discount these reports as fabrications. Plaintiffs' experts testified that, assuming the course deviation posited by plaintiffs, the deviation was probably the result of an error in programming the INS. The ICAO Secretary General reached the same tentative conclusion in his report. Moreover, plaintiffs' experts testified that the crew would have known of the deviation or, if they did not, that their ignorance was due to gross negligence in failing to check their instruments. (The jury was also informed that the ICAO Report concluded that the crew probably would not have been aware of the error.) Plaintiffs then introduced evidence of a 1978 Soviet intercept of a KAL flight to prove that this crew would have known of the hazards of straying into Soviet airspace.

Appellees add that even if one believed KAL's claim that KE007 stayed on course up to waypoint NIPPI, the flight must have then turned suddenly in the direction of Sakhalin Island to reach the crash site. KAL responds that if this were the correct scenario, there would be no basis for a finding of willful misconduct. However, the crew could not have failed to notice such a glaring deviation, and their failure to notify ATC until after they were decompressing suggests willful misconduct. Appellees are not using this as a fallback scenario so much as they are emphasizing KAL's inability to suggest any innocent explanation for the disaster. Admittedly, plaintiffs' case at trial did not include any "smoking guns," but that is because no one knows exactly what happened. There was sufficient evidence here from which to decipher a pattern

of conduct giving rise to liability. If the only evidence for the proposed course deviation had been the wreckage in the Sea of Japan, plaintiffs could not have prevailed simply by drawing a straight line from Anchorage and arguing that the crew would have known of this course deviation but chose to cover it up. Here there was additional, albeit not uncontroverted, evidence that a course deviation appeared almost immediately after take-off, consistent with a 10 degree error in setting the INS longitude coordinate at Anchorage, combined with somewhat suspicious radio reports from the crew. When "questions [of willful misconduct] depend upon inferences to be drawn from essentially circumstantial evidence ... [o]ne can hardly imagine a clearer case in which such questions should have been left to the jury." *Berner v. British Commonwealth Pacific Airlines*, 346 F.2d 532, 538 (2d Cir. 1965) (reversing JNOV for plaintiffs in an air crash case), *cert. denied*, 382 U.S. 983 (1966).

B. *Evidentiary Rulings*

1. *The ICAO Report and Plaintiffs' Expert Testimony*

KAL objects to the introduction of the ICAO Report (and the appended Soviet intercept report), contending that it was hearsay not within the public records exception of Rule 803(8), FED. R. EVID. That rule provides, in pertinent part, that the following are not hearsay:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth ... factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

FED. R. EVID. 803(8)(C). "Rule 803(8)(C) is to be applied in a commonsense manner, subject to the district court's sound exercise of discretion ...." *City of New York v. Pullman Inc.*, 662 F.2d 910, 914 (2d Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982). KAL argues that there were no "factual findings" because the final report from the Secretary General — criticized for lacking hard evidence from

which to draw its conclusions — was never adopted by the ICAO Council. KAL also contends that the sources of the Report's information concerning the probable flight path, especially the so-called "Russian line" provided in the Soviet intercept report, lacked trustworthiness. Finally, KAL argues that admission of the ICAO Report contravened Rule 403, FED. R. EVID., because the jury was misled into believing that the conclusions were authoritative.

We disagree with KAL's characterization of the Report as non-final. By a special resolution passed a few weeks after the disaster, the ICAO Council directed "the Secretary General to institute an investigation . . . and to provide an interim report to the Council within 30 days . . . and a complete report during the 110th Session of the Council." After first giving the Council an interim report as required by the resolution, the Secretary General ultimately provided his "final report" to the Council, although he qualified it by conceding that the report was based on incomplete evidence and promising to supplement the Report if any new information came to light. The minutes of the Council session indicate the submission of the Secretary General's "final report" on December 12, 1983. The Council had the power to endorse or ignore the Report but apparently not revise it. *Cf. New York v. Pullman*, 662 F.2d at 914 ("As an interim report subject to revision and review, the report did not satisfy the express requirement of the Rule that the proffered evidence must constitute the 'findings' of an agency or official."). After sending the Report to the Air Navigation Commission for review and comment to determine whether any changes should be made in ICAO's Rules of the Air in light of the incident, the Council chose not to endorse it. Even so, the Secretary General was acting in the capacity of a public official when he conducted "an investigation made pursuant to authority granted by law" (in this case, the special resolution) and issued his final report. *Cf. In re Multi-Piece Rims Prods. Liab. Lit.*, 545 F. Supp. 149, 151 (W.D. Mo. 1982) (admitting letters from NHTSA employee acting in an official capacity and describing evaluative tests).

We are somewhat more troubled, however, with the district court's resolution of the trustworthiness question under Rule 803(8)(C). Although the ICAO Report was based on very limited hard evidence, this alone would not undermine its finality or trustworthiness. *See Beech Aircraft v. Rainey*, 488 U.S. 153, 168 (1988) (upholding the "broad admissibility" of facts, conclusions, evaluations and opinions contained in an aircraft accident report, because "the admission of a report containing 'conclusions' is subject to the ultimate safeguard—the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions"). In this case, the district court let KAL introduce the ANC report criticizing the Secretary General's report. But KAL's trustworthiness objection focuses on the Preliminary Soviet Report appended to the ICAO Report and the Secretary General's use of the uncorroborated "Russian line" in arriving at his conclusions. Among other problems with the Soviet report, KAL claims that it was politically motivated, seeking to exonerate the Soviet Union's actions. Standing alone, we doubt that the Soviet report would have been admissible under Rule 803(8)(C), but its inclusion as an appendix to the ICAO Report would not automatically render the Secretary General's otherwise admissible report objectionable. *See FAA v. Landy*, 705 F.2d 624, 633 (2d Cir.) ("As a statement by a foreign government to the federal government, incorporated in the FAA's factual findings resulting from an investigation made pursuant to authority granted by law, the [German] telex was admissible as a public record and report under Fed.R.Evid. 803(8)(C)."), *cert. denied*, 464 U.S. 895 (1983).

The more difficult question is whether the alleged untrustworthiness of the Soviet report renders the ICAO Report inadmissible on those same grounds, at least those portions based in part on the Russian intercept line. Rule 803(8)(C) "assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present." FED. R. EVID. 803 advisory committee note. "The burden is on the party disputing admissibility

to prove the factual finding to be untrustworthy." *United States v. American Tel. & Tel. Co.*, 498 F. Supp. 353, 364 (D.D.C. 1980); *accord In re Aircrash in Bali, Indonesia*, 871 F.2d 812, 816 (9th Cir.), *cert. denied*, 110 S. Ct. 277 (1989). In *Rainey*, the Supreme Court observed that "a trial judge has the discretion, and indeed the obligation, to exclude an entire report or portions thereof . . . that she determines to be untrustworthy." 488 U.S. at 167. While the Soviet report may have been particularly untrustworthy in its rendition of the actual intercept (indeed, in a recent interview with Izvestia, the Soviet pilot responsible for the shootdown disputed the sanitized official version, *see* Wash. Post, Jan. 25, 1991, at A16), the radar track itself was generally believed by several sources, including the United States government. At a news briefing on the day of the incident, the Secretary of State told reporters that KE007 "strayed into Soviet airspace over the Kamchatka Peninsula" and was tracked by the Soviets "for some 2-1/2 hours."

The district court clearly understood its duty to make a threshold trustworthiness finding and recognized its power to exclude any portions of the Report it felt were untrustworthy. KAL's counsel effectively conceded that the factual section of the ICAO Report (contained in the first 35 pages) was admissible. The district court initially decided not to admit one section of the ICAO Report discussing the Russian intercept line, but then let even that part in when KAL's counsel retracted his initial objection to the section standing alone. The district court decided that KAL's trustworthiness objections were more properly addressed to the jury for purposes of evaluating the weight to be accorded the Secretary General's conclusions: "[Y]ou might convince the jury that it is not worth the paper it is written on, but I am not going to throw the whole report out just because they might believe that in this particular case." Not surprisingly, the transcript of the district court's decision from the bench lacks the clarity of a written opinion. In hindsight, we would rather the court had made explicit preliminary findings, preferably

in limine, as to the trustworthiness of each challenged portion of the ICAO Report. But mindful that the burden was and is on KAL, we are not convinced that the court failed to carry through on its duties under Rules 104(a) and 803(8) or abused its discretion when it admitted the ICAO Report in its entirety.

Furthermore, as explained previously, plaintiffs did not rely on the Secretary General's report (or the Soviet intercept report) to establish the probable flight path. Instead, once the jury accepted plaintiffs' extrapolation, the ICAO Report helped fill the causation gap by evaluating the likelihood that an INS programming error was at fault. Indeed, even the ANC Report that KAL introduced to criticize the ICAO Report confirmed that there was a "significant deviation from track" that could not be explained. The danger, of course, is that the jury was also presented with the ICAO Report's working assumption based on the Russian line, and this may well have influenced their willingness to believe plaintiffs' extrapolation. Even so, this is precisely the sort of judgment call by the trial judge that is entitled to deference on appeal and will not be disturbed absent clear error. *See United States v. Payne*, 805 F.2d 1062, 1066-67 (D.C. Cir. 1986) (per curiam). The district court did not abuse its discretion under Rules 803(8)(C) and 403.

Finally, KAL criticizes the admission of testimony by plaintiffs' experts, again because of the supposed lack of any basis, other than the ICAO and Soviet reports, for the assumed deviation from which all their opinions sprang. Appellees respond that both experts were qualified pilots with significant trans-Pacific experience, and that the ICAO Report was a legitimate source for them to rely on. Because we have decided that the ICAO Report was properly admitted, the expert testimony is also unobjectionable.

2. *Evidence of Prior Incidents*

Plaintiffs introduced evidence of prior KAL incidents to suggest that the crew knew they risked suspension if

they returned to Anchorage for reprogramming, and that the crew was aware of the hazards of straying into Soviet airspace. KAL objects that evidence of these prior incidents was irrelevant and unduly prejudicial. Rule 404(b), FED. R. EVID., allows the admission of evidence concerning "prior bad acts" in limited circumstances, to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." It is of course true that a prior incident must be sufficiently similar to be probative of intent or motive in relation to the incident at issue. *See, e.g., Edwards v. Consolidated Rail Corp.*, 567 F. Supp. 1087, 1105-06 (D.D.C. 1983), *aff'd mem.*, 733 F.2d 966 (D.C. Cir.), *cert. denied*, 469 U.S. 883 (1984).

In this case, plaintiffs sought to demonstrate through circumstantial evidence what the crew of KE007 knew or should have known about the consequences of their conduct and also to rebut KAL's suggestion that misprogramming was impossible or correctable en route. These are permissible ends that do not require the exacting degree of similarity that would be necessary when using prior bad acts to prove specific intent or motive. *See Exum v. General Elec. Co.*, 819 F.2d 1158, 1162-63 (D.C. Cir. 1987) ("How substantial the similarity must be is in part a function of the proponent's theory of proof," and a theory of notice "imposes a less rigorous requirement of similarity.").

KAL asserts that it never claimed misprogramming was impossible or that crews did not know about the hazards of intruding Soviet airspace. Neither statement is entirely correct. While the evidence of these prior incidents was no doubt somewhat prejudicial, plaintiffs appear to have introduced it for permissible purposes. *See, e.g., United States v. Payne*, 805 F.2d at 1066-67. Knowledge (not specific intent or motive) was a relevant issue, notwithstanding KAL's mild concession in opening argument that the crew would have known of the dangers of flying into Soviet airspace. If KAL wanted to remove the issue from trial so as to exclude evidence of the 1978 shootdown, a

pre-trial stipulation might have done the trick. In fact, before trial KAL was arguing that the intercept was an unforeseeable, superseding cause of the disaster, a claim the court felt had to be left to the jury. *See In re KAL Disaster*, 704 F. Supp. at 1149 & n.37. We conclude that the evidence of prior incidents was properly admitted at trial.

C. *Punitive Damages*

BUCKLEY, *Circuit Judge*: These consolidated wrongful death actions are governed by the terms of the Warsaw Convention, a multilateral treaty to which the United States has adhered since 1934. *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, Article 1(1), 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. app. § 1502 note (1988). Relying on *Floyd v. Eastern Airlines*, 872 F.2d 1462, 1483-89 (11th Cir. 1989) ("*Floyd I*"), *rev'd on other grounds*, 59 U.S.L.W. 4307 (U.S. Apr. 17, 1991), KAL argues that the Convention disallows awards of punitive damages and that the district court therefore erred in submitting the issue to the jury. KAL's position was recently adopted by the Second Circuit in *In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988*, No. 90-7388, slip op. 2927 (2d Cir. Mar. 22, 1991) ("*Lockerbie*").

Plaintiffs maintain that punitive damages are permitted whenever they are available under applicable local law and, in any event, should be recoverable once it is shown that the carrier acted with willful misconduct. For the reasons that follow, we agree with KAL and our sister circuits; hence, we set aside the jury's award of punitive damages.

The Warsaw Convention establishes the liability of international air carriers for harm to passengers, baggage, or goods; fixes limitations on such liability; and achieves a degree of uniformity in documentation and in the procedures and substantive law applicable to claims arising out of international air carriage. *See* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498-500 (1967). The central purpose of the Convention is to limit the liability of air carriers. The contracting states in 1929 believed that limitations on liability would promote the development of the fledgling commercial air industry by allowing the airlines to predict their exposure to monetary damages and thereby obtain needed capital and adequate insurance coverage.

See Eastern Airlines v. Floyd, 59 U.S.L.W. 4307, 4312 (U.S. Apr. 17, 1991) ("*Floyd II*"); *Lockerbie*, slip op. at 2934; *Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); Lowenfeld & Mendelsohn, *supra*, 80 Harv. L. Rev. at 498-500.

Article 17 of the Convention defines a carrier's liability for harm to passengers. *See Air France v. Saks*, 470 U.S. 392, 397 (1985). Article 17 provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 24 allows contracting states to decide the standing and "respective rights" of claimants who seek recovery under Article 17, provided that "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." Under Article 25, a carrier "shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability" when it is shown that the damage suffered by the claimant was caused by the carrier's "willful misconduct," as defined by the law of the forum court.

Under the Convention as originally ratified, Article 22(1) limited the carrier's Article 17 liability to approximately $8,300, and Article 20(1) allowed the carrier to avoid liability altogether by proving that it acted with due care. *See Floyd I*, 872 F.2d at 1467. With respect to flights to or from the United States, these provisions were superseded by the Montreal Agreement, an agreement among air carriers executed in 1966 and approved by the Civil Aeronautics Board pursuant to its authority under the Federal Aviation Act of 1958. In the Montreal Agreement, air carriers raised the per passenger liability limit to $75,000 and assumed virtual strict liability for death or injury of passengers by waiving their due care defenses under Article 20(1). *See* Order of Civil Aeronautics Board

Approving Increases in Liability Limitations of Warsaw Convention and Hague Protocol, May 13, 1966 (approving Agreement CAB 18900), 31 Fed. Reg. 7302 (1966), *reprinted in* 49 U.S.C. app. § 1502 note. KAL has been a party to the Montreal Agreement since 1969. *See Chan v. Korean Air Lines*, 490 U.S. 122, 124 (1989).

Whether punitive damages are allowable in actions governed by the Warsaw Convention must, in our opinion, turn on the nature of the liability contemplated by Article 17. The Convention sets forth an international liability scheme that was intended to be uniform. *See Lockerbie*, slip op. at 2956-57; *Floyd I*, 872 F.2d at 1488. We must honor this uniformity by "giv[ing] the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Saks*, 470 U.S. at 399. If a recovery is inconsistent with the shared expectations underlying Article 17, it is precluded. *See Lockerbie*, slip op. at 2961-62; *Floyd I*, 872 F.2d at 1487. *Cf. Floyd II*, 59 U.S.L.W. at 4309, 4311 (term "bodily injury" in Article 17 excludes recovery for purely mental injuries); *Saks*, 470 U.S. at 405 ("accident" requirement precludes liability under Article 17 unless injury caused by unexpected or unusual event external to passenger).

Although the Convention does not address the issue of punitive damages, the Article 17 phrase "liable for damage sustained" strongly implies that the carrier's responsibility is compensatory and extends only to the reparation of loss resulting from the death or injury of passengers. *See Floyd I*, 872 F.2d at 1483, 1486; *In re Air Crash Disaster at Gander, Newfoundland*, 684 F. Supp. 927, 931 (W.D. Ky. 1987) ("*Gander*"). The words "damage sustained" do not refer to legal damages; they refer to actual harm experienced, whether physical injury to the passenger or, in the case of death, monetary or other loss to his survivors. *See Lockerbie*, slip op. at 2959; *see also* Calkins, *The Cause of Action Under the Warsaw Convention (pt. 2)*, 26 J. Air L. & Com. 323, 335 (1959). Article 17 does not specify that the damage must be sustained "*by the passenger*" and thus allows for the possibility of traditional wrongful death

actions. The requirement that the damage "so sustained" be "caused" by an accident on board the aircraft, however, reenforces the conclusion that recovery is available only for actual loss; an accident cannot "cause" punitive damages. *Lockerbie*, slip op. at 2959-60.

French is the controlling language of the Convention. *See* Article 36; *Floyd II*, 59 U.S.L.W. at 4309; *Saks*, 470 U.S. at 397. The relevant phrase in French is "*dommage survenu.*" The parties have not suggested that this phrase carries any special meaning in French law, and we are satisfied that "damage sustained" in the official American version of Article 17 — the version ratified by the Senate in 1934 — is an accurate translation of "*dommage survenu.*" *See Lockerbie*, slip op. at 2958-59; *Floyd I*, 872 F.2d at 1486-87; *Gander*, 684 F. Supp. at 931.

The wording of Article 17 thus describes liability for compensatory or actual damages — that is, damages that "will compensate the injured party for the injury sustained . . . [or] will simply make good or replace the loss caused by the wrong or injury." *Black's Law Dictionary* 352 (5th ed. 1979). In contrast, punitive damages are recognized by federal courts as retributive and deterrent in nature. *See Lockerbie*, slip op. at 2937-38; *Floyd I*, 872 F.2d at 1487. They "are not compensation for injury," but rather are awarded "to punish reprehensible conduct and to deter its future occurrence." *IBEW v. Foust*, 442 U.S. 42, 48 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). "Their role therefore 'runs counter to the normal reparative function of tort and contract remedies.' " *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2932 (1989) (O'Connor, J., concurring in part and dissenting in part) (quoting K. Redden, *Punitive Damages* § 2.1, at 24 (1980)). The purposes served by punitive damages are incompatible with the liability scheme set forth in Article 17. *See Floyd I*, 872 F.2d at 1487.

In *Lockerbie*, the Second Circuit pointed out that a minority of state courts in the United States view punitive

or exemplary damages as serving, at least in part, a "compensatory" function. *Lockerbie*, slip op. at 2938-39. The court concluded, however, that the Warsaw Convention preempts all state-law causes of action; otherwise, the uniform application of the Convention would be disrupted by the uneven patchwork of state punitive damages theories (a potential problem in diversity suits arising in states that adhere to the minority view). *See id.* at 2944-52. We need not reach this preemption question because plaintiffs here base their claim to punitive damages solely on federal maritime law. *See* Brief for Appellees at 29, 35-36.

Our construction of the Convention does not end with a word-by-word parsing of Article 17. We may properly look to the larger context of the Convention and its history, including the negotiations of its drafters and the interpretations given it by contracting states. *See Floyd II*, 59 U.S.L.W. at 4309; *Saks*, 470 U.S. at 396-97. In doing so, we must interpret and apply the terms of Article 17 in accordance with their French legal meaning because the Convention was drafted in French by civil law jurists. *Floyd II*, 59 U.S.L.W. at 4309; *Saks*, 470 U.S. at 399; *see Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

Nothing in the minutes and notes of the Convention's drafters indicates that the contracting parties ever considered the concept of punitive or deterrent damages for passengers' deaths. *See Lockerbie*, slip op. at 2958; *Floyd I*, 872 F.2d at 1487. The drafting history does indicate, however, that the drafters intended the carrier's liability to be contractual in nature. *See Second International Conference on Private Aeronautical Law: Minutes (Warsaw 1929)*, at 22 (R. Horner & D. Legrez trans. 1975) ("Warsaw Minutes") ("The system of liability of the Convention is based only upon the document of carriage.") (statement of Henri De Vos, reporter).

The kinds of damages available in French civil actions founded on contract parallel the compensatory forms of monetary recovery available in American tort suits. *See*

Lockerbie, slip op. at 2954-56, 2960. One commentator has observed, "There is nothing in French law prohibiting compensation for any particular kind of damage, be it mental injury, suffering due to the death of a member of the family, or pain and suffering due to a physical injury. Provided the damage is *certain* and *direct*, all forms of damage can be compensated to their full extent." G. Miller, *Liability in International Air Transport* 112 (1977) (emphasis in original) (footnote omitted). The French concept of *dommage matériel* provides compensation for pecuniary loss resulting from death or injury; *dommage moral* is roughly equivalent to compensatory damages for nonpecuniary loss, such as pain and suffering. *See* R. Mankiewicz, *The Liability Regime of the International Air Carrier* 157 (1981); G. Miller, *supra*, at 112-14.

These notions of recoverable damages are compensatory and not punitive in character. The same can be said of the kinds of recovery afforded by other civil law contracting states, such as Germany. *See Lockerbie*, slip op. at 2960-61. The Warsaw Convention practice of the principal common law contracting party, Great Britain, is consistent with this understanding. Although English courts in tort contexts do permit punitive damages in "unique and rare circumstances," *id.* at 2961 (citing *Rookes v. Barnard*, [1964] 1 All E.R. 367, 410 (H.L.) (Lord Devlin)), they have construed "*dommage*" in Article 17 to encompass only "monetary loss." *See id.* at 2959 (citing *Fothergill v. Monarch Airlines Ltd.*, [1981] App. Cas. 251, [1980] 2 All E.R. 696, [1980] 2 Lloyd's Rep. 295, 299 (H.L.) (Lord Wilberforce)). We conclude, therefore, that a monetary liability that is punitive and does not compensate for loss suffered would be contrary to the expectations of the jurists who drafted Article 17 and the contracting states that adopted it.

This conclusion comports with our obligation to construe the Convention in a manner that will promote uniformity. *See Floyd II*, 59 U.S.L.W. at 4313. The uniform application of the treaty would be threatened if the United States, alone among contracting states, imposed

a form of liability wholly outside the compensatory scheme of Article 17. *See Lockerbie*, slip op. at 2974-75; *Floyd I*, 872 F.2d at 1487-88. Undoubtedly, punitive liability for international carriers "would be controversial for most signatories," and we should construe the Convention to avoid such a "potential source of divergence." *Floyd II*, 59 U.S.L.W. at 4313.

In challenging our reading of "damage sustained," plaintiffs rely on *Smith v. Wade*, 461 U.S. 30, 36 n.5 (1983), in which the Supreme Court dismissed the argument that the phrase "for redress" in 42 U.S.C. § 1983 precludes recovery of punitive damages. *Smith* only confirms our analysis. In addition to noting that the tort cause of action created by section 1983 is expansive, 461 U.S. at 36 n.5, the Court relied on the common law context in which Congress enacted section 1983, a context in which punitive damages were a well-established tort remedy. *See id.* at 35, 37 n.5. *Cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984) (federal regulation of nuclear plant safety does not preempt punitive damages award because "Congress assumed that traditional principles of state tort law would apply with full force unless . . . expressly supplanted"). Similarly, we may infer from its civil law context that Article 17 does not contemplate the award of punitive damages.

Plaintiffs argue that Article 24's references to actions for damages "however founded" and to claimants' "respective rights" make the availability of punitive damages a matter of local law. But Article 24 requires that any action for damages within the scope of the Convention satisfy the Convention's "conditions and limits." This requirement ensures the uniform application of the Convention. *See* N. Matte, *Treatise on Air-Aeronautical Law* 419 (1981). The most natural reading of the treaty is that the terms of liability established by Article 17 are among the "conditions" enforced by Article 24. *See* Calkins, *supra*, 26 J. Air L. & Com. at 327 ("conditions and limits" language in Article 24 designed "to protect the Conventional cause of action," *i.e.*, Article 17); *see also* G. Miller,

supra, at 125 ("What Article 17 does is to determine the conditions under which an air carrier shall be liable."); *Floyd II*, 59 U.S.L.W. at 4308. Thus, Article 24 provides a clear textual basis for concluding that the Convention overrides liability awards that are inconsistent with Article 17.

Some courts and commentators have concluded that Article 24 preserves independent domestic causes of action based on tort law. *See, e.g., In re Aircrash in Bali, Indonesia, on Apr. 22, 1974*, 684 F.2d 1301, 1311 n.8 (9th Cir. 1982); Calkins, *supra*, at 327. Others disagree, taking the view that the Convention, when applicable, provides the exclusive cause of action. *See, e.g., Boehringer-Mannheim Diagnostics, Inc. v. Pan Am. World Airways*, 737 F.2d 456, 458 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985). *See also Floyd I*, 872 F.2d at 1482 n.33 (discussing cases). In deciding only that punitive damages are contrary to the Convention, we need not take sides in the exclusivity debate.

Regardless of their views on independent causes of action, most authorities agree that pursuant to Article 24 the proper "measure" of damages recoverable under Article 17 is left to the domestic law of the contracting states. *See Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1987); *Mertens v. Flying Tiger Line*, 341 F.2d 851, 858 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); R. Mankiewicz, *supra*, at 189; H. Drion, *Limitation of Liabilities in International Air Law* 125-26 (1954). This fact, however, begs the question whether such damages may be more than compensatory.

We think it evident they may not. In reporting the preliminary draft of the proposed treaty to the national delegates at Warsaw, the International Technical Committee of Air Law Experts ("CITEJA") stated:

> The question was asked . . . if one could determine who the persons upon whom the action devolves in the case of death are, and what are the damages subject to *reparation*. It was not possible to find a satis-

> factory solution to this double problem, and the CITEJA esteemed that this question of private international law should be regulated independantly [sic] from the present Convention.

Warsaw Minutes at 255 (emphasis added). The reporter's use of the word "reparation" bolsters our reading of Article 17 and "tends to exclude the concept of punitive damages." *Lockerbie*, slip op. at 2967.

Moreover, the drafting history shows that the CITEJA's inability to formulate a single rule for calculating damages resulted from the difficulty of choosing among widely varying national laws of descent and distribution governing who could sue on a decedent's behalf in wrongful death actions and who could sue only for personal loss. *See id.* at 2964-67; *see also* Calkins, *supra*, at 327-28 (discussing excerpts of drafting record). This inability does not suggest that the drafters ever contemplated the possibility of imposing liability that goes beyond compensation for loss, however determined. *Lockerbie*, slip op. at 2967.

Nor does a finding of willful misconduct under Article 25 create a right to recover punitive damages. Article 25 bars the carrier from relying on those provisions in the Convention that "exclude or limit" liability. Article 17 is not among these. It is settled that willful misconduct negates the due care exclusion from liability contained in Article 20 and the monetary limitations contained in Article 22. *See Lockerbie*, slip op. at 2971; *Grey v. American Airlines*, 227 F.2d 282, 285 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956). Disagreement about whether other provisions are affected, *see* H. Drion, *supra*, at 80 n.5 (citing authorities), does not obscure the fact that certain key articles in the Convention continue to apply in cases of willful misconduct, and no authority suggests that the basic liability terms of Article 17 (or any of the other "conditions" preserved by Article 24) were to be displaced. *See Lockerbie*, slip op. at 2971-72. Given the drafting context discussed above, we agree with the Second Circuit that the drafters would not have considered Article 17 a "limitation" on liability. *See id.* at 2972. In sum, Article

25 is "most reasonably interpreted as [an] exception[ ] to the limitations on the recovery of *compensatory* damages within the Convention, not as authority for the recovery of *punitive* damages." *Gander*, 684 F. Supp. at 932 (emphasis in original); *accord Floyd I*, 872 F.2d at 1484.

The Hague Protocol of 1955 and the Montreal Protocol No. 4 of 1975 provide further confirmation. These Protocols, among other things, clarified Article 25 to make it explicit that the limits on liability lifted in the event of willful misconduct are only the monetary limits contained in Article 22. *See Floyd I*, 872 F.2d at 1483-84 & n.35. The United States has not ratified the Hague or Montreal Protocols and they are not binding on us, but we may look to them for clarification of the Convention's terms. *Id.* at 1484 n.35; *see Saks*, 470 U.S. at 403-04 ("subsequent interpretations of the signatories help[ ] clarify the meaning" of terms (referring to history of unratified Protocols)); *see also Floyd II*, 59 U.S.L.W. at 4312. As the dissent points out, the Hague Protocol did more than clarify Article 25; it also "narrow[ed] the waiver of limitations in cases of willful misconduct." Dissenting Op. 7. It did so by adopting a new treaty definition of willful misconduct that supplanted Article 25's reference to forum law. *See* Lowenfeld & Mendelsohn, *supra*, 80 Harv. L. Rev. at 503-06. But that substantive amendment does not belie the view that the Protocol's specific reference to the monetary limits of Article 22 was understood only to be a clarification. *See Floyd I*, 872 F.2d at 1483.

The policies underlying the Convention support our conclusions. The Convention represented a bargain between air carriers on the one hand and passengers and shippers on the other. Carriers obviously gained from the limitations on liability agreed to by the contracting states, but passengers and shippers also benefited, primarily from the Convention's clear presumption of liability, which eliminated the difficult task of proving fault on the part of the carrier. Furthermore, under the law of contract as it existed prior to the Convention, the carrier could essen-

tially avoid liability for harm resulting from the often hazardous business of air transportation:

> [I]n reality, this Convention creates against the air carrier an exceptional system, because in the majority of the countries of the world, contracts of carriage are concluded under a system of free contract. The carrier is free to insert in the contract clauses which exclude or reduce his liability, as much for goods as for travelers. You are of course aware that they have lost no opportunity to do so, and presently many air carriers operate under this unregulated contractual system, and, in practice, in fact, they are not liable.

Warsaw Minutes at 47 (statement of Georges Ripert of France).

The essential bargain struck by the contracting parties in Warsaw was presented to the United States Senate as a principal reason for ratifying the Convention:

> It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.

Senate Comm. on Foreign Relations, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules Relating to International Transportation by Air, Sen. Exec. Doc. G, 73d Cong., 2d Sess. 3-4 (1934) (Report of Secretary of State Cordell Hull). The award of punitive damages would be contrary to this essential bargain because it would increase the amount of litigation, the cost of insurance, and ultimately the price of air transportation. *See*

Lockerbie, slip op. at 2975-77; *Floyd I*, 872 F.2d at 1487-88.

Our dissenting colleague suggests that our reading of the Convention will leave undeterred the diabolical carrier who might deliberately sabotage its own aircraft in the hope of reaping a fraudulent insurance recovery. This scenario ignores, of course, the important deterrence provided by the criminal law. Moreover, because of the "accident" requirement in Article 17, it is by no means certain that the protections of the Convention would be available to a carrier that destroyed its own aircraft. *Cf. Floyd II*, 59 U.S.L.W. at 4309 ("an air carrier is liable for passenger injury [under the Convention] only when ... there has been an accident"); *Saks*, 470 U.S. at 406-07 (same). As the dissent's scenario is not before us, we express no opinion on any speculative questions it might or might not raise.

What we can and do say, however, is that whatever evil one might be willing to impute to the corporate mind, the possibility of so wanton an act does not license us to disregard the policy choices made by the Convention's contracting parties. *See Floyd II*, 59 U.S.L.W. at 4312 ("Whatever may be the current view among Convention signatories, in 1929 the parties were more concerned with protecting air carriers and fostering a new industry than providing full recovery to injured passengers, and we read [the terms of Article 17] in a way that respects that legislative choice."). Article 17 of the Warsaw Convention "sets the parameters" of plaintiffs' right of recovery at compensatory damages only. *Gander*, 684 F. Supp. at 932. These parameters are not expanded by Articles 24 or 25. Accordingly, we vacate the jury's award of punitive damages.

KAL argues that the district court committed a second error by failing to undertake a choice-of-law analysis prior to instructing the jury on punitive damages. As we conclude that such damages are not recoverable even if plaintiffs are correct about choice of law, this issue is not

relevant to our disposition of the case. We therefore express no view on this aspect of the dissenting opinion.

III. Conclusion

The district court properly left the willful misconduct decision to the jury and did not abuse its discretion in admitting plaintiffs' evidence. The district court erred, however, in allowing plaintiffs to pursue their punitive damage claims, and therefore we vacate the jury's punitive damage award in this case.

So ordered.

MIKVA, *Chief Judge*, dissenting from Part II(C): I do not share my colleagues' conclusion that the Warsaw Convention bars recovery of punitive damages. Instead, I would remand with instructions that the district court engage in a proper choice of law analysis.

A. *Warsaw Convention*

The Warsaw Convention, officially denominated the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, was adhered to by the United States in 1934. *See* 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. App. § 1502, note. The Convention was negotiated with hopes of facilitating the growth of the infant airline industry, and the drafters sought to create a scheme that would presume carrier liability for air disasters but cap monetary liability at a very low level. Article 17 provides that "[t]he carrier shall be liable for damage sustained in the event of the death or wounding of a passenger . . . ." As the majority explains, this liability appears to cover only compensatory damages. Article 22 originally capped monetary damages at approximately $8,300 per passenger. That figure was raised to $75,000 by the 1966 Montreal Agreement for flights to and from the United States (undermining the goal of uniformity for the sake of preventing denunciation by the United States government).

Two other provisions of the Convention are of particular relevance in the instant appeal. Article 24 leaves procedural questions to local law provided that "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." This language contemplates the availability of causes of action that are separate from Article 17, though governed by the limitations of the Convention. Finally, Article 25 provides that "[t]he carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his willful misconduct . . . ." The dispute before us requires that we carefully sort out the interplay of these various sections.

The majority holds that the Warsaw Convention was intended to provide compensatory relief only, and that therefore punitive damages are not available even in causes of action not based on Article 17. Nowhere are punitive damages explicitly prohibited. In this country, "legislative silence with respect to punitive damages do[es] not preclude such a recovery." *Racich v. Celotex Corp.*, 887 F.2d 393, 396 (2d Cir. 1989); *see Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). Even so, I am persuaded by the majority's conclusion that Article 17 cannot be read to authorize the recovery of punitive damages for claims based on the Convention. If any of the plaintiffs in these cases premised their complaints solely on a Warsaw Convention cause of action, I would concur in holding that they were not entitled to recover punitive damages. But few if any of the complaints were so limited in pleading only the Convention as a cause of action.

The plaintiffs in these cases brought their damages claims against KAL under a potpourri of legal theories including the Warsaw Convention. In denying KAL's motion to strike plaintiffs' jury demand, the district court untangled the sources underlying each of the plaintiff's complaints and found that most alleged a combination of state and federal claims (both common law and statutory) along with claims based on the Convention. *See In re Korean Air Lines Disaster of September 1, 1983*, 704 F. Supp. 1135, 1151-55 (D.D.C. 1988). Almost all of the complaints alleged something other than merely the Convention as a basis for recovery and several failed to plead the applicability of the Convention at all. *See id.* at 1151 n.40, 1154-55. The district court correctly emphasized that, whatever the cause of action, the claims were all subject to the limitations contained in the Convention.

The majority decides that complaints sounding in other causes of action such as federal maritime law are also not entitled to punitive damage awards. I find this step in the court's logic somewhat difficult to fathom. There appear to be two basic rationales underlying such a conclusion: (1) the Convention provides the exclusive cause of action

(thereby entirely preempting other possible causes of action that might separately allow punitive damages), or (2) Article 17 creates an implicit limitation on liability governing recoveries premised on separate causes of action (a.k.a. partial preemption). The majority appears to employ the latter rationale, but then dismisses the force of Article 25 in part on the strength of decisions premised on the exclusivity rationale. I think neither one is persuasive and therefore respectfully dissent.

1. *Exclusivity*

The majority correctly eschews reliance on the first approach, choosing "not [to] take sides in the exclusivity debate." Maj. Op. at 25 The Convention is not the exclusive remedy for passengers injured on international flights; in fact, Article 24's reference to "any action for damages, however founded" clearly contemplates actions arising under separate sources of law but places some limits on recovery. Courts and commentators have rejected suggestions that the Convention provides the exclusive cause of action for international air disasters. *See, e.g., In re Air Crash in Bali, Indonesia*, 684 F.2d 1301, 1311 n.8 (9th Cir. 1982) ("[T]he Convention has never been read to *limit* plaintiffs to a cause of action arising thereunder, but rather to limit the recovery in suits for injury."); *Tokio Marine & Fire Insur. Co. v. McDonnell Douglas Corp.*, 617 F.2d 936, 942 (2d Cir. 1980) ("[T]he Convention draftsmen ... did not intend that cause of action to be exclusive."); Calkins, *The Cause of Action under the Warsaw Convention*, 26 J. AIR L. & COM. 323, 327-28 (1959).

The Second Circuit just recently decided that the Warsaw Convention prohibits the recovery of punitive damages. *See In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, slip op. No. 269 (2d Cir. Mar. 22, 1991). The court took exclusivity as its working premise, *see id.* at 2940-44, 2963, somewhat astonishing in light of the Second Circuit's own precedents. For a long time, that court had held that *no* cause of action is established by the Convention. *See Benjamins v. British European Airways*, 572

F.2d 913, 919 (2d Cir. 1978) (finally overruling proposition that had been accepted for twenty years), *cert. denied*, 439 U.S. 1114 (1979). In subsequent decisions, the court ruled that this cause of action was not exclusive. *See Tokio Marine*, 617 F.2d at 942. Now, by dismissing the statement in *Tokio Marine* as mere dicta, the Second Circuit has gone full circle from believing that the Convention provides no cause of action to deciding that it provides the sole cause of action for plaintiffs.

Apart from its apparent failure to abide by circuit precedent, the *Lockerbie* court's support for the exclusivity holding is hardly overwhelming. For instance, the court emphasized (at 2942) that other countries have held that the Convention is the exclusive cause of action. These were not interpretations of the Convention, however: the common law countries cited in the opinion all had to *enact* national legislation making Article 17 the exclusive cause of action. The United States has, of course, never done so. Moreover, its description of decisions from other circuits is also somewhat perplexing. For instance, in one case the Ninth Circuit observed that "the delegates did not intend that the cause of action created by the Convention to be exclusive." *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400, 414 n.25 (9th Cir. 1983). Yet the *Lockerbie* court asserts that the decision "rebutted the idea that a cause of action may be founded on some law other than the Convention." Slip op. at 2941-42.

In fact, the Ninth Circuit has concluded on more than one occasion that the cause of action is not exclusive. *See, e.g., In re Air Crash in Bali, Indonesia*, 684 F.2d at 1311 n.8. Although, the decisions from other circuits appear to be evenly divided on the issue, notwithstanding the court's claim in *Lockerbie* (at 2963) that the weight of authority is fairly one-sided. *See Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1482 n.33 (11th Cir. 1989) (collecting cases), *rev'd on other grounds*, 59 U.S.L.W. 4307 (April 17, 1991). *See also Alvarez v. Aerovias Nacionales de Colombia S.A.*, 59 U.S.L.W. 2481 (S.D. Fla. Jan. 25, 1991) (distinguishing exclusive *remedy* of the Convention from the suggestion

that it also provides the exclusive cause of action). The Supreme Court has twice now declined to address the exclusivity question. *See Eastern Airlines, Inc. v. Floyd*, 59 U.S.L.W. at 4314; *Air France v. Saks*, 470 U.S. 392, 408 (1985). The fundamental error of the *Lockerbie* court's decision is the premise that the cause of action provided by the Warsaw Convention is exclusive, and my colleagues are wise not to enter this fray unnecessarily.

2. *Implicit Limitation in Article 17*

If the court does not premise its holding on an exclusivity rationale, it must mean that Article 17 acts as a *limitation* on the liability that an air carrier would face when sued under separate causes of action. But then Article 25 would come into play and waive any such limitation in cases of willful misconduct: "The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct ...." Art. 25(1). The majority relies heavily on *Lockerbie* for the proposition that Article 25 does not trump Article 17, but there the court had taken exclusivity as its starting point. It is one thing to say that the Convention prohibits punitive damages because it is the sole available cause of action and does not provide for them; it is quite another to conclude that Article 17 acts as a limitation on damages restricting recovery under other causes of action that allow punitive damages.

The Eleventh Circuit has also decided not to take sides in the debate over exclusivity. In resolving the punitive damages question in *Floyd*, the court first decided that the Convention is not itself a basis for seeking punitive damages. The court concluded that Article 17 was entirely compensatory in tone and rejected plaintiffs' argument that Article 25's reference to willful misconduct implied an exception. *See* 872 F.2d at 1483-85. Next the court rejected the plaintiffs' effort to seek punitive damages under state common law, holding that state law was preempted to the extent that it was inconsistent with the compensatory scheme of Article 17. *See id.* at 1485-87.

Preemption analysis will not work in this case, however, because we are confronted with two legal schemes that stand in rough equipoise under the Supremacy Clause: the Warsaw Convention and federal maritime law. *See In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1161 n.19 (5th Cir. 1987) ("As a ratified treaty of the United States the Warsaw Convention is equal in stature and force as any other domestic federal law."); *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 936-37 (D.C. Cir. 1988). The Convention cannot, therefore, preempt federal law to the extent of any inconsistency with its compensatory tone; Article 17 can only prevent recovery of punitive damages otherwise available under federal maritime law if it is construed as a limit or condition governing damages under Article 24, but then it becomes subject to waiver in cases where Article 25 applies.

The court in *Floyd* also relied on subsequent proposals which would have amended Article 25 so that it would only trump the monetary cap in Article 22. *See* 872 F.2d at 1483-84 (discussing the Hague and Montreal Protocols). But the original language of Article 25 does not suggest that only Article 22 was covered, and the United States never ratified these amendments. *See id.* at 1468-69. Moreover, the United States responded to the proposed changes by threatening to denounce the entire Convention unless the monetary limits were raised substantially. *See* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 509-16, 532-46 (1967). In *Floyd*, the Eleventh Circuit candidly admitted that this country never ratified the Protocols, but found "their clarification of the operation of Article 25 to be instructive." 872 F.2d at 1484 n.35. This reasoning is difficult to square with the Supreme Court's recent instruction that "where the text is clear . . . we have no power to insert an amendment." *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) ("We must thus be governed by the text—solemnly adopted by the governments of many separate nations—whatever conclusions might be drawn from the intricate drafting history . . . .").

Indeed, in reversing the decision that compensatory damages for purely mental injuries were available under Article 17, the Supreme Court criticized the lower court's interpretation of subsequent drafting history surrounding the Protocols. *See Eastern Airlines, Inc. v. Floyd*, 59 U.S.L.W. at 4312-13. To the extent that the 1955 negotiating history cited by the Eleventh Circuit in *Floyd* reflects the Hague drafters' understandings about what their predecessors may have had in mind a generation earlier, it is entitled to only marginal weight. *See McKelvey v. Turnage*, 792 F.2d 194, 200 (D.C. Cir. 1986) ("As the Supreme Court and this court have repeatedly remarked, the views of later Congresses as to the meaning of enactments by their predecessors are of little, if any, significance."), *aff'd*, 485 U.S. 535 (1988).

At best, the subsequent proposals and accompanying drafting history demonstrate only that the original text was ambiguous. At worst, the proposals imply that the negotiators wanted to adjust the bargain that had been struck originally. Indeed, the amended version of Article 25 proposed in the unratified Hague Protocol would not have simply clarified an existing understanding of Article 25 but represented a revised *quid pro quo*: in exchange for a higher ceiling on damages, carriers sought to narrow the waiver of limitations in cases of willful misconduct. *See* Lowenfeld & Mendelsohn, at 503-06. *See also* Comment, *Role of Choice of Law in Determining Damages for International Aviation Accidents*, 51 J. AIR L. & COM. 953, 989 (1986) (discussing Guatemala Protocol which would have eliminated Article 25 altogether in exchange for a higher monetary cap of $100,000). Thus, the history as well as the language of Article 25 supports the conclusion that punitive damages are not prohibited by the Warsaw Convention in cases of willful misconduct even if a cause of action based solely on the Convention would not authorize such damages.

The majority concludes that allowing punitive damage windfalls would contravene the Convention's primary purpose and understanding of the contracting parties that the

treaty was intended to limit the liability of air carriers. The scheme of the Convention closely resembles workmen's compensation statutes which allow workers to recover prescribed compensatory damages for accidental job-related injuries. These laws reflect a *quid pro quo* between employees, who are relieved of the burden of proof, and employers, who benefit from the cap on damages. *See* 2A A. LARSEN, WORKMEN'S COMPENSATION LAW § 65.11 (1990), at 12-9. Similarly, the Warsaw Convention balances strict carrier liability for injuries sustained by passengers (Articles 17 and 20) against a cap on monetary damages (Article 22). *See Block v. Compagnie Nationale Air France*, 386 F.2d 323, 327 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

However, workmen's compensation laws do not limit the availability of separate damage actions in cases of intentional misconduct by the employer. *See, e.g., Pratt v. National Distillers & Chem. Corp.*, 853 F.2d 1329, 1336-39 (6th Cir. 1988) (punitive damages are available for intentional injuries), *cert. denied*, 489 U.S. 1012 (1989); LARSEN §§ 68.00-.14. Similarly, the narrow exception in Article 25 of the Convention does not undermine the basic purpose of limiting carrier liability; it simply recognizes that in cases of serious misconduct carriers should not enjoy the benefits of these limitations. Imagine that a carrier decided to deliberately sabotage one of its own flights in hopes of receiving a large insurance settlement on the aircraft. If such egregious conduct went undetected, a financially strapped airline could invest a paltry amount in anticipated payments to decedents' estates (on a typical flight of the Concorde, for instance, that might create maximum liabilities of $500,000 to the passengers) in exchange for a multi-million dollar insurance pay-off. Even if such unthinkable conduct came to light, the maximum compensatory judgment to the plaintiffs might still be less than the potential insurance recovery discounted by the risk that the fraud might be discovered. The majority's decision would completely foreclose the availability of punitive damages even in such an egregious case. While

the facts of the present case are not as stark as those hypothesized, the point remains the same: if plaintiffs can demonstrate willful misconduct, the limitations of the Convention (and the goals that those limitations serve) should have no application.

B. *Choice of Law*

KAL's pre-trial motion to dismiss plaintiffs' punitive damage claims was premised exclusively on its argument that the Warsaw Convention precluded such an award. Near the end of the trial, the district court denied KAL's motion from the bench. Apparently for the first time in the proceedings, KAL's counsel then requested a choice of law analysis, but in a very vague and non-committal way.

> The Court: What law should I pick?
>
> Mr. Barry: I don't know.
>
> The Court: Where is this case being tried on the issue of liability?
>
> Mr. Barry: Here in the District of Columbia.
>
> The Court: With respect to damages, this aspect of damages which would ordinarily tail along will be a part of an action on liability and damages, except for the construct of the treaty; I mean, what law would apply?
>
> Mr. Barry: Well, Your Honor, I think you have to do a choice of law analysis, just as Judge Green did in the Air Florida litigation here on this very same issue, and she held that laws of differing jurisdictions were going to apply to different issues.... I don't know the answer to the question .... I raise only a problem. I wasn't anticipating this, to tell you the truth.

The decision alluded to by KAL counsel was *In re Air Crash Disaster at Washington, D.C. on January 13, 1982*, 559 F. Supp. 333 (D.D.C. 1983) (hereinafter "*In re Air Florida Crash*"). The district court's questions reflect a couple of assumptions: that forum law would automati-

cally govern liability issues and that damages would presumptively be governed by the same jurisdiction's laws. Both premises are questionable: choice of law principles followed by the District of Columbia courts seek to apply the substantive law of the jurisdiction with the closest connection to and greatest interest in a claim, *see Hercules & Co. v. Shama Restaurant Corp.*, 566 A.2d 31, 40-41 (D.C. App. 1989), and separate choice of law analysis of different substantive issues (called "dépecage") is now routine. *See id.*; *In re Air Florida Crash*, 559 F. Supp. at 341.

The threshold question is whether the choice of law basis for KAL's motion to dismiss the punitive damages claims was raised too late. Unlike jurisdictional issues, courts need not address choice of law questions *sua sponte*. It is not clear whether the District of Columbia would follow a default rule that presumes local law controls unless choice of law objections are raised in a timely manner, but that seems to be the norm. *See Cavic v. Grand Bahama Devel. Co.*, 701 F.2d 879, 882-83 (11th Cir. 1983); Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301 (1989). Although "[t]he choice of law question regarding punitive damages should be resolved as soon as possible," *In re Air Crash Disaster at Sioux City, Iowa, on July 19, 1989*, 734 F. Supp. 1425, 1429 (N.D.Ill. 1990) (hereinafter "*In re Iowa Crash*"), Rule 12(h)(2), FED. R. CIV. P., provides that "[a] defense for failure to state a claim upon which relief can be granted . . . may be made . . . [as late as] the trial on the merits." If the short verbal exchange cited above was enough to place the issue before the judge, then the district court should have engaged in a choice of law analysis or at least asked for supplemental briefing at that point. *See Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057, 1059-60 n.1 (5th Cir. 1981) (failure to state a claim could be pressed on appeal where defendant had "sufficiently alerted" the court of the defense during trial). KAL preserved the argument, though just barely. *Cf. In re Air Florida Crash*, 559 F. Supp. at 336-37 (rejecting contention that Air Florida "waived" its right to present

a choice of law argument for the first time on reconsideration of the district court's ruling, noting that its "interest in the question arose only when this Court ruled that divergent punitive damages laws would govern these parties' liability").

The next question is whether KAL properly pled that Korean law was applicable. Rule 44.1, FED. R. CIV. P., does not require that a choice of law argument based on foreign law appear in the pleadings. Instead, as the Advisory Committee explained, "[t]he new rule does not attempt to set any definite limit on the party's time for giving the notice of an issue of foreign law; in some cases the issue may not become apparent until the trial and notice then given may still be reasonable." In a related vein, appellees contend that KAL failed to satisfy the proof requirements in Rule 44.1, but the explanation in the Advisory Committee notes suggests otherwise. *See also* Pollack, *Proof of Foreign Law*, 26 AM. J. COMP. L. 470 (1978). Along with its memoranda of law in support of its JNOV motion, KAL filed a translation and explanatory letter concerning the relevant provisions of the Korean civil code, and added that "KAL preserved its argument that Korean law applied to the issue of punitive damages by including in each Answer filed in this litigation a 'Notice of Applicability of Foreign Law' pursuant to Fed. R. Civ.P. 44.1." The district court never explicitly rejected KAL's choice of law argument on grounds of being unreasonably late, and I believe it should have been addressed.

The district court entirely failed to engage in the required choice of law analysis. KAL contends that the district court improperly applied D.C. law on the punitive damages question because a proper choice of law analysis would have required reference to Korean civil law. KAL argues that, in multi-district airplane crash litigation, involving plaintiffs from numerous other jurisdictions (both foreign and domestic), the trial court could not just unthinkingly apply forum law to the punitive damages question. Indeed, several other courts have engaged in sometimes agonizing choice of law analyses in similar

cases. *See In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 644 F.2d 594 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981) (hereinafter "*In re Chicago Crash*"); *In re Iowa Crash*, 734 F. Supp. 1425; *In re Air Florida Crash*, 559 F. Supp. 333. *See generally* Lowenfeld, *Mass Torts and the Conflict of Laws: The Airline Disaster*, 1989 U. ILL. L. REV. 157.

For state law claims brought in federal court under diversity jurisdiction, the district court must apply the choice of law principles of the state in which it sits. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). When a case is transferred pursuant to 28 U.S.C. § 1407(a) by the Panel on Multi-District Litigation, the transferee court must apply the choice of law rules of the states where the transferor courts sit. *See In re Chicago*, 644 F.2d at 610 (citing *Van Dusen v. Barrack*, 376 U.S. 612 (1964)). No such analysis was undertaken in this case. *Cf. Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (per curiam) (reversing federal court's decision to ignore forum state's choice of law rule that would have required application of Cambodian law to wrongful death action). The district court appears to assume that forum law automatically controls and that dépecage is inappropriate, but even application of District of Columbia choice of law principles would dictate otherwise, *see Hercules & Co.*, 566 A.2d at 40-41, and we have no idea what would happen if the district court applied the choice of law principles of each transferor court. The district court erred in failing to undertake a choice of law analysis in this case, a task best left in the first instance to the district court on remand. Even so, it is necessary to explain at some length below why I am unpersuaded by appellees' arguments.

Appellees suggest that their punitive damage claims were not derived from state law but arose from general federal maritime law. In similar circumstances, the Third Circuit held that

> the maritime character of the tort brings the controversy under the governance of federal law and it is

> immaterial whether admiralty or diversity jurisdiction is relied upon as justification for suing in the federal forum. Obviously, a court thus undertaking to apply federal substantive law would have no occasion to defer to or apply state choice of law rules.

Scott v. Eastern Air Lines, Inc., 399 F.2d 14, 17 (3d Cir. 1967) (plane crash in Boston Harbor), *cert. denied*, 393 U.S. 979 (1968). The district court never explained its refusal to engage in a *Klaxon* choice of law analysis in these terms, though its treatment of KAL's motion to strike plaintiffs' jury demand suggests this reasoning. *See In re KAL Disaster*, 704 F. Supp. at 1151-57. There the district court held that all of the plaintiffs had properly pleaded (or could amend their complaints to so plead) federal maritime claims and the Warsaw Convention as causes of action, *see id.* at 1154, 1155-56 (but recognizing that some plaintiffs had only pled state law claims brought pursuant to diversity jurisdiction).

Even if that was the district court's undisclosed reason for not engaging in a *Klaxon* analysis for each transferor court, it would not relieve the court of the need to engage in *some* choice of law analysis under federal law. *See Lauritzen v. Larsen*, 345 U.S. 571, 575-77 (1953) (finding a conflict between application of Danish and U.S. maritime law). In other words, if application of federal maritime law would authorize punitive damages but Korean law would not, a conflict may exist that needs to be resolved. This is precisely what happened in *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000 (9th Cir. 1987), a case where the court had to decide as a matter of federal choice of law principles whether Polish law or California law provided the measure of recovery in a wrongful death claim arising from a crash in Poland and governed by the Federal Sovereign Immunities Act.

In undertaking the federal choice of law analysis, the court in *Harris* looked to the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1969) as "an appropriate starting point." *See id.* at 1003-04. The RESTATEMENT is, however, a dubious choice of law methodology for a federal court

to pick. Choice of law is a very messy field, with different approaches endorsed by competing camps. *See In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732, 739 (C.D. Cal. 1975) (describing it as "a veritable jungle"). In the past, the *lex loci delicti* rule was widely used in tort cases, directing courts to use the substantive law of the jurisdiction where the injury occurred, and vestiges of this much criticized approach remain in the RESTATEMENT. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS (hereinafter "REST.") §§ 145-146, 175 (presumption of applying the local law where the injury occurred unless another jurisdiction has a more significant relationship to the incident or the parties involved). In *Harris*, the court decided to apply Polish law of damages, largely because that was the site of the accident and no other jurisdiction had a demonstrably greater interest in the case. *See* 820 F.2d at 1004 & n.5. In fact, the *lex loci* starting point used by the RESTATEMENT might be difficult to apply in this case: it is not clear whether KE007 was shot down in Soviet airspace, over Japanese territory or in international waters. *Cf. In re Air Florida Crash*, 559 F. Supp. at 348 n.21 (describing earlier case involving a DC-4 mid-air collision where half of the wreckage fell into the Potomac River (deemed part of the District of Columbia) and the other half fell on the Virginia shore); *In re Air Crash Disaster Near Bombay, India*, 531 F. Supp. 1175, 1182 (W.D. Wash. 1982) (parties disputed whether aircraft crashed in international waters or within India's territorial waters). Indeed, largely because of such uncertainties, the Supreme Court has declined to place much emphasis on the *lex loci* rule in maritime torts. *See Romero v. International Terminal Oper. Co.*, 358 U.S. 354, 384 (1959); *Lauritzen*, 345 U.S. at 583-84.

The RESTATEMENT also endorses an amalgam of the "most significant relationship" (or "center of gravity") test and governmental interest methodologies, *see* REST. § 6, reflecting an uneasy compromise struck among the drafters. *See* von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 963-64 (1975). The

governmental interest approach seeks to identify which jurisdictions may have an actual interest in having their substantive law apply to a particular controversy, but the resolution of true conflicts is achieved through different means depending on the variant. *See generally* G. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1043-50 (1987). Whatever the relative merits of the various approaches, the court in *Harris* went straight to the RESTATEMENT as a good source for general choice of law rules to be used as federal common law in the area.

In counting up the contacts, KAL emphasizes that South Korea is its place of incorporation, its principal place of business, and the place where its crews are trained. Appellees respond that many of the passengers came from, the flight originated in, and all of the tickets were purchased in the United States. They cite a decision that suggests using a "center of gravity" approach like the RESTATEMENT in maritime cases. *See Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970). In that case, the Supreme Court applied the Jones Act to a claim by a Greek seaman injured on a Greek ship while it was in American territorial waters, emphasizing that the Greek company that owned the ship had its largest offices in the U.S., was owned by a Greek citizen domiciled in the U.S., and transported cargo to and from the United States. *See id.* at 307-10. But *Hellenic Lines* does not necessarily support appellees' analysis of the relevant contacts in this case because the site of the accident and KAL's principal place of business were not in the United States. *See Romero*, 358 U.S. at 383-84 (applying Spanish law to maritime tort claim brought by a Spanish sailor injured on board a Spanish ship while in American waters); *Lauritzen*, 345 U.S. at 592 (applying Danish law to maritime tort that occurred in Cuban waters because all parties and the ship were Danish, even though the injured sailor embarked on the ship in New York).

Lauritzen employed something akin to the general, multi-factor approach described in section 6 of the

RESTATEMENT, though without the initial presumption for applying the *lex loci* rule:

> Maritime law, like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved. The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority.

Id. at 582 (the relevant contacts included the place of the wrongful act, the law of the flag, the allegiance or domicile of the injured, the allegiance of the shipowner, the place of the contract, the inaccessibility of a foreign forum, and the law of the forum); *accord Romero*, 358 U.S. at 383. In fact, *Lauritzen* gave the "law of the flag" the same presumptive weight that the RESTATEMENT gives to the place of injury. *See* 345 U.S. at 585-86 (because the ship was registered in Denmark, Danish law "must prevail unless some heavy counterweight appears").

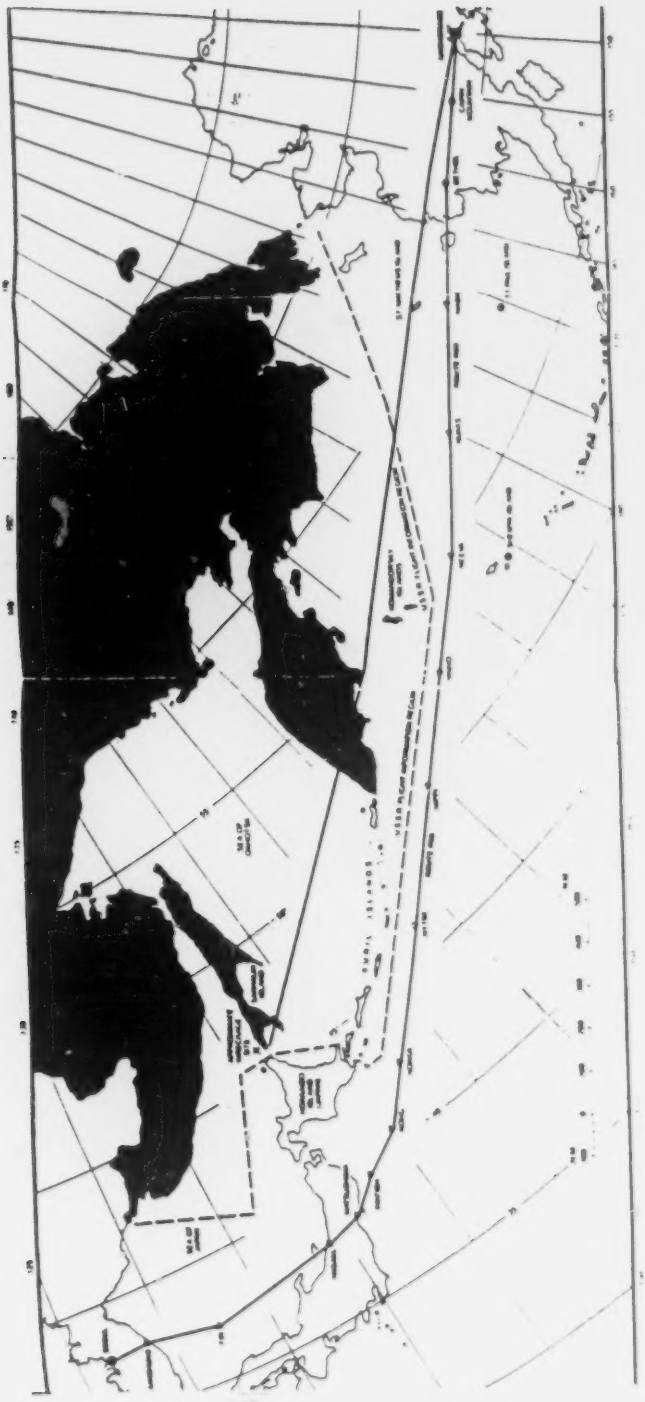
At least two federal courts have used the contacts discussed in *Lauritzen* to resolve choice of law problems in air disasters on the high seas. In *Noel v. Airponents, Inc.*, 169 F. Supp. 348 (D.N.J. 1958), a case where a Venezuelan airliner crashed in the Atlantic Ocean, the district court held that federal maritime law would govern to impose liability on the U.S. corporation that had serviced the aircraft before departure. The court emphasized that "[t]he parties to the present litigation are American nationals, and neither the foreign carrier nor the Republic of Venezuela appear to have any interest in the outcome." *Id.* at 350-51. In *Air Crash Near Bombay*, 531 F. Supp. 1175, a case where an Air India Boeing 747 crashed into the Arabian Sea shortly after takeoff, the district court held that Indian law would govern product liability claims against the American manufacturers of allegedly defective aircraft components. The court focused on "the essentially Indian character of this aircraft accident in Indian territorial

waters on a flight originating in India involving an Indian air carrier and predominantly Indian victims." *Id.* at 1191. This case presents a much sharper conflict, however, because the contacts appear to be more evenly divided and do not point overwhelmingly to one jurisdiction or the other.

As KAL correctly points out, the question of punitive damages is of primary interest to jurisdictions having some link to the defendant. *See In re Chicago Crash*, 644 F.2d at 612-13 (decedents' home jurisdictions only have an interest in recovery of compensatory damages); *In re Air Florida Crash*, 559 F. Supp. at 352-55. Assuming this is not a *Klaxon* thicket, the choice is between recovery of punitive damages under general federal maritime law versus non-recovery under Korean civil law. *See In re Air Florida Crash*, 559 F. Supp. at 347 & n.19, 351. The balancing of competing interests is no easy task, and even trying to decipher what those interests are is an undertaking fraught with difficulties. Even assuming that Korea made a conscious decision to protect home businesses from excessive judgments, an interest it deemed more important than the added increment of deterrence from punitive damages, such a trade-off for purposes of internal Korean law does not mean that other interested jurisdictions cannot choose to apply punitive damages if they have a countervailing interest in punishment and deterrence that is involved in the controversy. In this case, the United States has an interest in both punishing egregious conduct that begins in this country and deterring its future recurrence. The United States' interest in deterring willful misconduct on international flights linked to its borders might well outweigh Korea's more parochial interest in protecting home businesses. *Cf. Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 128 Cal. Rptr. 215, 546 P.2d 719 (applying California dram shop law to accidents caused by Nevada taverns even though Nevada had intentionally immunized its taverns from such liability), *cert. denied*, 429 U.S. 859 (1976).

I would therefore remand the punitive damages question to the district court with instructions to engage in a proper choice of law analysis.

APPENDIX



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL 565/Misc. 83-345
Washington, D.C.
July 17, 1989
10:00 a.m.

IN RE: KOREAN AIR LINES
DISASTER OF SEPTEMBER 1, 1983

TRANSCRIPT OF TRIAL BEFORE THE HONORABLE
CHIEF JUDGE AUBREY E. ROBINSON, JR.
UNITED STATES DISTRICT JUDGE, AND A JURY

APPEARANCES:

For the Plaintiffs:	DONALD MADOLE, ESQ. MILTON SINCOFF, ESQ. GEORGE FARRELL, ESQ.
For the Defendant:	GEORGE N. TOMPKINS, ESQ. DONALD TURNER, ESQ. DESMOND BARRY, ESQ.
Court Recorder:	Mary Thomas
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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

[32] * * *

MR. TURNER: I believe, Your Honor, that the two motions, that is, defendant Korean Air Lines' motion to preclude the introduction into evidence of the ICAO report, as well as Korean Air Lines' motion concerning the preclusion of the testimony of plaintiffs' expert pilot Captain Houston, [33] are very much intertwined, because the real basis—purported basis, for Captain Houston's testimony is his participation in the investigation by ICAO, as well as the ICAO report itself.

THE COURT: No, but I understood that there is also some expertise that he is supposed to have notwithstanding his participation in compiling the report. Is that not correct?

MR. TURNER: When we go directly to the witness' testimony on his deposition, it becomes clear that although he was present during some of the ICAO investigation, and he is a retired pilot who has some experience with air navigation systems, it is really when it comes down to what he is relying upon, he goes back to the ICAO investigation and the ICAO report. And I would like to address that.

There may be some brief areas where I may have to stretch it out a little bit, Your Honor, and there is some testimony that I think it is important for Your Honor to hear from the depositions. And there is some very confusing testimony as well, and I realize we are getting towards the end of the day and we have a trial to get on with. But I do think that this is so important, Your Honor, that both of these issues will really set the tone for the entire trial. I think they will have a great deal to do with whether or not this case is tried on speculation, untrustworthy and unsupported hearsay—

[34] THE COURT: Let's not use hyperbole now. Let's just get, you know—

MR. TURNER: Well, I'll go right to it, Your Honor. I think Your Honor in your decision on the summary judgment motion really did hit the key points that are going to determine this case.

And where Your Honor said, "Based upon the plaintiffs' experts, Mr. Houston and Sam Parrott, they claim that they

have been able to simulate the most probable course of Korean Air Lines 007 on the night it was shot down. This determination was based on their review of the available FAA, US military, USSR, and Japanese radar data, the estimated location of record, the wind reports of Korean Air Lines 007, and the crew's inability to directly communicate with various air traffic control facilities."

Your Honor hit it right on the head, and Your Honor had sworn affidavits in front of him from those experts. That is what I want to get to right now. What is the support, where is the evidence, what is the trustworthiness of whatever it is that they were relying upon?

In opposition to our motion, Your Honor, plaintiffs relied upon a recent case of Beech v. Rainey, which involves government investigation reports and the admissibility and conclusions and opinions contained in such reports. That case makes it very, very clear. Trustworthiness is the key. [35] Does the investigating body have a duty to conduct the investigation? Do they conduct a reasonable investigation, and do they have a basis for their facts and conclusions?

Your Honor, we will see when we go through some of the testimony, particularly of Mr. Houston, and when we review in detail just a few passages from the ICAO report, we will see that there is nothing there. This is a pyramid of hearsay and speculation.

Let me get right to it, Your Honor.

Captain Houston, in his affidavit in support of the motion, submitted a chart. When questioned in his deposition about that statement in his affidavit that he was talking about USSR and Japanese data radar—and I don't mean to get hung up on terms, what is radar data, because you will see how that changes through the testimony of the witness—what is it that the witness was relying upon when he was talking about USSR and Japanese radar?

That also serves as the very basis of the ICAO report—the very basis of the ICAO report, because that establishes a line that all the investigators and all the experts are now starting off from that point. Here is a line. That's where the plane was. Why? Because, according to Mr. Houston, the Soviet

radar data and the Japanese radar data said the plane was there.

I am referring particularly to Exhibit 1, to Captain [36] Houston's July 9, 1986 probable route flown by 007 which puts the plane for a long period, a 5-hour period or so, flying straight out over Soviet air space. And what is the basis of that report?

When the witness, Mr. Houston, was asked about it, he referred to the ICAO report. When the cartographer that had created that chart and subsequent charts was asked about it, he referred to the ICAO report. And they are talking about putting together two charts, one that appears on page 46 and one that appears on page 50 of the ICAO report, but particularly it is page 46 of the ICAO report that has the black line, which is purportedly radar plot from USSR.

That is what puts the plane on that northerly course over Soviet air space. What is the source of that information? I asked Captain Houston because he said that they had Soviet and Japanese radar data when he was participating in the investigation back in November of 1983.

I asked him several times in several different ways on his deposition what it was that he was relying upon. He kept coming back and saying, he did not take any notes, he does not have any documents, but it is all there in the ICAO report. I have many references to his deposition. I will try to avoid them as much as possible.

Now, where does this line come from? I will call Your Honor's attention to page 43 of the ICAO Report. Page [37] 43, paragraph 2.12.9. What is it that ICAO had upon which they drew that line? There is an Appendix F to the ICAO report which is the Soviet report, but there is not a single coordinate. There is not a single radar data. There is not a single point in the Soviet report, so when I asked Mr. Houston about what it was that that line was based on since he was a participant in the investigation, he said, "No, all we had was a continuous line."

When asked numerous times, he said, "We had no radar data. We just had that continuous line." Now, the continuous, referring to page 43, 2.12.9, of ICAO, says the track of [KE007] is depicted in the USSR preliminary report—that is the report they have attached to ICAO—showed a distinct curve over southern Sakhalin Island whereas the track shown by the Wakenai, the Japanese radar, followed a smoother curve. Nowhere in this report do we see that supposed Wakenai curve. There is just nothing there. We do not see any Japanese radar curve.

Now, the radar from the Japanese—supposedly from the—provided by the Japanese, followed a smoother curve, so they had a distinction between the two. The Soviet was a sharper curve, the Japanese was a smoother curve. How could they reconcile it? Then they say, making two assumptions—if we make two assumptions, maybe we can figure it out. An explanation could be given as follows.

[38] Firstly, assuming that the radar track information is based on memories. I assume—there appears to be a missing word, memories of radar observers rather than on recorded data. The shape of the depicted curve could have been smoother and an even more distinct bulge could have been displayed by an air defense radar on Sakhalin Island.

Your Honor, this was shocking when I finally understood what this paragraph meant. They had two different curves. In Appendix F, there is the Soviet curve—

THE COURT: And they cannot account to how they got to either one.

MR. TURNER: They do not even know if it is based on some private up in Sakhalin Island memory or whether it is based on some radar data. This, Your Honor, is illustrative of what this document is and why the U.S. Government never accepted it and why they never got a vote to make it a final report. It is illustrative of the fact, Your Honor, that this was a political and diplomatic hot potato. They put out a report, and they closed the books. That is what this document is.

The main reason they never came to a final vote on this was because the[y] wanted their technical committee, the Air

Navigation Commission, to investigate the technical aspects of it after they first came out with this basic report, and they did set up the Air Navigation Committee and [39] have them take a look at it from the technical point of view.

What did the Air Navigation Committee say about the Secretary General's report? I am referring to cumulative Exhibit 288 which is the Air Navigation Committee report at page 14. They were charged with doing a technical analysis.

"During the technical review of the Secretary General's report as contained in Report number CWP-776 for the Air Navigation Commission has not attempted to offer any firm conclusions regarding the various aspects of the incident because the information presented to the commission in relation to the total period of Flight 007 was incomplete, and some of the information received by ICAO had differences which could not be cleared up. Furthermore, the commission found it difficult to validate and endorse the conclusions connected with the scenarios postulated in the Secretary General's report because any one of them contained some points which could not be explained satisfactorily."

Their own technical committee issues their report that there is too much conflicting information. You cannot come to any conclusions. "The commission noted that the evaluations and simulations conducted did not include an extensive evaluation of INS equipment malfunctions or other failures involving significant track deviations which have occurred in the past and is of the opinion that study of this subject should be pursued."

[40] Their own technical committee thought more should be done, and you could not come to any conclusions. That, Your Honor, is just the beginning of the lack of trustworthiness which is clear based upon their own technical committee says it is untrustworthy, and that goes for both the ICAO report and the basis of Captain Houston's testimony, and I will get to that right now, Your Honor.

As I showed Your Honor Exhibit One, Captain Houston's affidavit, which was submitted in support of plaintiff's opposition to defendant's summary judgment motion and which it

appears Your Honor relied upon to some extent in deciding that motion, what was that document?

We took the deposition, Your Honor, of the cartographer that Mr. Sincoff likes to refer to, a Mr. Avino, a man that did some silk-screening process and put together that chart that was submitted to you, and what did Mr. Avino say about this chart on his deposition two weeks ago when asked at page 92 of his deposition after a discussion and representations by Mr. Sincoff that Exhibit One to the affidavit was the same as Number Two to Captain Houston's deposition and was the same as the large blown-up chart which may be sitting over there but was initially identified as 401? It may have been withdrawn by plaintiffs by now, but it was initially identified on their exhibit list as 401. They are all the same, just different sizes.

[41] When the cartographer was asked about it, he said as far as 401—and I can show you references that 401 and Exhibit One to the affidavit and Houston Exhibit Two, they are all the same. Mr. Avino, when asked as far as Exhibit One is concerned, "Would you agree with me that it should be discarded because it is inaccurate?" Mr. Avino, the cartographer said, "Yes, I do."

"Question—" This is Avino deposition, page 92, "And any use of it for any purpose whatsoever prior and in the past, you would not want to place any confidence in. Right?

"Answer. Correct."

Now, Your Honor, plaintiffs have modified that exhibit, and they have come up with a new one. That is the one that Mr. Madole was holding up in your chambers earlier. This chart which they now admit should be discarded and should never have been relied upon but yet was submitted to you and to some extent, you relied upon, was inaccurate and should have been discarded.

Now they are coming up with a new version of that same exhibit, and now they want to deceive the jury with that exhibit as well, but I am sorry, that is getting off the subject of ICAO report and Captain Houston.

I pressed Captain Houston, Your Honor, to try to find out what it was that he was referring to in his affidavit that was

submitted to you as USSR radar data and [42] what it was that he was relying upon as Japanese radar data. I asked a hundred different ways on his deposition. Generally speaking, with regard to Soviet data, at page 24 of his deposition, he said, "What I saw was a continuous line."

When I tried to find out what it was, beginning page 34 of his deposition, "I am trying to find out what it was you had at that time." We had—

"Question. Mr. Houston, did you have Houston Exhibit Two," referring back to the investigation that took place when the simulations were done at Boeing in 1983, shortly after the accident where he said he referred and relied upon ICAO data. He did not have his Exhibit Two then, of course. That was not prepared until years later. He did not have the Soviet—I am sorry. He did not have the ICAO report because he was participating in the investigation that eventually ended up with that report. I was trying to find out what he had.

Page 35 of the deposition.

"Question. What did you have? That is my question.

"Answer. "We had a chart similar to Exhibit Two here that they had projected the Kenai radar plot on."

Kenai being the first section that is the FAA radar data which only goes out a short distance from Anchorage. They had the King Salmon radar plot which goes from Anchorage—from Cairn Mountain to Bethel, basically, the gateway that [43] is still in Alaska. The Soviet—the USSR radar plot and the Japanese self-defense forces radar, and they had drawn a line for those radar to hook those radar plots together.

"Question. Do you have a copy of that document?

"Answer. No.

"Question. Who prepared that document?

"Answer. The ICAO people.

"Question. Who?

"Answer. Probably Mr. Freer.

"Question. Did Mr. Freer tell you that?

"Answer. No, but I—that is an assumption that he did because he was running the thing, and I think that he, in

fact, I think all the ICAO people, all three of the ICAO people prepared it.

"Question. Do you know what data they prepared the Russian plot based upon?

"Answer. Yes, on the data they got from the USSR defense forces.

"Question. Do you know whether or not they received specific radar hits?

"Answer. I believe they did.

"Question. Have you ever seen that?

"Answer. No.

"Question. What is the basis of your assumption that they did?

[44] "Answer. They sent a team over to the USSR, and the USSR apparently cooperated.

"Question. Did you ever observe any certified Government document concerning that plot?

"Answer. No.

"Question. And you have never heard any sworn testimony concerning it either? Is that correct?

"Answer. No. No.

But there he is leaving the door open that maybe there is some Soviet data, but when asked on page 55,

"Question. Have you ever seen any raw data that came out of a radar computer from the Japanese self-defense forces?

"Answer. I have never seen any raw data.

"Question. Have you ever seen a list of coordinates that came, other than that one coordinate that is in the ICAO report?

"Answer. No, I have not.

"Question. Have you ever seen any computer printouts of locations—"

THE COURT: Well, was there ever any indication that anybody else had seen it? That it ever existed?

MR. TURNER: No one else has testified to having anything other than that continuous line.

THE COURT: So if he did not see it, the inference **[45]** is nobody saw it. Is that right?

MR. TURNER: Well, that is what I was—I do not know personally, of course, whether it exists, but when I was pressing him on it—and this really relates more to the Japanese data than the Soviet data—that is when the issue of this classified information came up.

But on the Russian radar data, I think the clearest impression—

THE COURT: Well, the point that I am making—

MR. TURNER: —of what there was—

THE COURT: —the point that—what I am trying to understand—

MR. TURNER: I am sorry.

THE COURT: – the only way it got in the report is through Captain Houston. Is that what you are saying?

MR. TURNER: In the ICAO report?

THE COURT: Yes.

MR. TURNER: No, I do not think so, Your Honor.

THE COURT: How else did it get there?

MR. TURNER: The ICAO investigators received this chart, this thing in the back of the report which was part of the Soviet report. There was a line drawn there.

THE COURT: Yes.

MR. TURNER: There is no basis for it in the report. One assumed that the ICAO investigators did go over [46] and get some sort of printouts like all the other radar facilities have, computer printouts of where the radar screen sees the return from the—either in the radio device in the plane or sees the plane itself—and I just assumed that they must have had that. The ICAO people must have had that.

When I asked Mr. Houston about what they had—and he was talking about radar data early in his deposition—I thought they had that, but then when you read the ICAO report itself, it is clear. They do not even know if it is based on someone's memory or reported data. This is now removed hearsay. Some private out in the boondocks has done something. Maybe his memory, maybe a document. He gives that to his superiors who draw a line, who give it to a cartographer, who give it to ICAO.

ICAO then has some people—Mr. Houston does not know who and there is no identification of who—put this line on this piece of paper on page 46 of ICAO which is that so-called radar line. Then some unknown person puts it in the ICAO report, draws it on the ICAO—puts it in the ICAO report. Now, Captain Houston is relying upon it. There is no basis.

There is no trustworthiness here, Your Honor. When was the Soviet line drawn? Right after they found out they killed 269 innocent people, Your Honor. Then they draw up the line to show that this plane was out here all the time. [47] They do not give any support for it. Not a single coordinate is in that report. No support whatsoever. The ICAO investigators apparently bought it, but it is clear they had no foundation to do so. The Japanese—

THE COURT: Well, what you are saying to me is that I have got to make a determination as to how good this investigation was.

MR. TURNER: Trustworthiness of the document, Your Honor.

THE COURT: No, no, no, no. You have got trustworthiness one way, and I look at it another way. You are telling me I have got to make some professional judgment as to whether they had enough data, whether the[y] drew the lines right, no matter what comes up in the report, and I do not believe that is the law.

MR. TURNER: No, no.

THE COURT: I do not believe that is the law.

MR. TURNER: I am not suggesting that, Your Honor.

THE COURT: Well, put it another way. The element of trustworthiness as I understand it has to do with the kind of group that is making the investigation, the source of the group. Whether or not it is a recognized unit, whether this is the kind of thing that they normally are expected to do, or whether this is some trumped-up business—and anybody can trump up a report—it is that kind of an assessment of [48] trustworthiness that I suspect is at the bottom of this requirement.

What you are telling me, in essence, is that I have got to have a mini-trial. You are going to try a lawsuit to me which has to do with the trustworthiness of every statement that appears in this report.

MR. TURNER: What I am suggesting, Your Honor, that there has to be a reasonable foundation—

THE COURT: No, no, you—

MR. TURNER: —for that document to have been—

THE COURT: Every single—

MR. TURNER: —be given—

THE COURT: —every single conclusion in the document—

MR. TURNER: No, Your Honor. No, Your Honor. What I am—

THE COURT: Well, let me ask you this way. Do you concede that there is anything about this document that is admissible in this case? You do not, do you?

MR. TURNER: I would say that there are—the majority—most of the stuff in the first 35 pages which is called the factual report—most of that is probably admissible, but there are plenty of unsupported opinions and conclusions that get into that as well, but most of the first 35 pages which—

[49] THE COURT: Went into the details of what they found and what in a—

MR. TURNER: The first 35 pages—34 pages are called the factual information. After that, it goes onto analysis and conclusions. I think that most of the 34 pages are factual. I am not saying every single fact—purported fact in there is, but most of it is. It is when they start going off speculating about where the plane was with no foundation. That is my problem. With no foundation.

THE COURT: Well, this whole case is about speculation. It is just whether the speculation has any basis within the limits of reasonable speculation. That is what the whole case is about because nobody knows, or if they know, nobody has told us. 20 years from now, we might find out because there is a lot more than this, you know, than we will ever be able to discern in a civil action. You know that, don't you?

MR. TURNER: Yes, Your Honor.

THE COURT: There are people who know exactly where this plane was shot down and how it got there.

MR. TURNER: I suspect you are right, Your Honor.

THE COURT: But we have—I am willing to bet by bottom dollar on it. When I know what the capabilities are in this world as between—certainly as between the Soviet Union and the United States, so we have got to go through all [50] the six years of litigation because all that is beyond our can, and nobody will breathe a word about it.

We know, and I can tell you I suspect all—most the room to go too, but that is what we have to deal with. That is why I am not going to make a lifetime project out of this case. It is important, but, you know, things are relatively important.

Now, what other thing? You mean this is an illustration. I guess you have got 50 or 60 illustrations of things for which there is no basis. Is that correct in the eyes of the—

MR. TURNER: Needless to say, yes, Your Honor. But let me get a little closer to help combine—I used in motion—and get closer to what you were just talking about, Your Honor, and that is what has been introduced at the deposition of Captain Houston as classified information, and that started as I was trying to get to the bottom of his opinions.

THE COURT: Did you find out that there was information and it was, in fact, classified?

MR. TURNER: No. The captain testified about for almost 20 pages on his deposition.

THE COURT: That it was classified?

MR. TURNER: That it was classified data, but in opposition to our motion to preclude his testimony, that [51] classified data is now not quite classified. It is confidential data. Let me just—if you will bear with me, Your Honor—just a little bit of the testimony of Captain Houston.

When I asked him about where they came up with coordinates for the accident site, page 143 of his deposition,

"Question. Sir, I am asking you if you know of a document that says what the coordinates of the accident site were," and the document being a document that was received from the Japanese authorities. The witness asked to go off the record. Then he came back on with this answer,

"Answer. I have seen some information from the Japanese self defense forces, but it is classified information. and I do not feel that I am at liberty to discuss it.

"Question. Are you in any way basing your opinion in this case upon this classified information that you are referring to?

"Answer. I really don't want to get into this any further. I have an obligation, and I am just not going to answer that.

"Question. Are you presently in possession of any of this classified information?"

This was his deposition, Your Honor, on June 15.

"Question. Are you presently in possession of any of [52] this classified data," and his answer was no.

In opposition to our motion, he submits an affidavit talking about some confidential data as being what he was talking about when he used the term classified information on his deposition. Captain Houston's July 8, 1989, affidavit in opposition to our motion to preclude his testimony.

"I, Frank L. Houston, was in Washington, D.C., May 31 and June 1 to be with Mr. Madole in his office. I was given a copy of the attached document by Mr. Madole. This is the classified data referred to in my deposition. Mr. Madole asked me to keep this document confidential, and it was labeled confidential. This was to be for my personal information only. I have spoken with Mr. Madole today, and he has authorized me to release this document."

When I asked him, Your Honor, on June 15 if he was in possession of this classified data, he said no. On July 8, he swore that he got it two weeks before his deposition and that now Mr. Madole has authorized him to release it. Later on on his deposition, Your Honor, when I was trying to find out what it is that this so-called classified data that he would not answer any questions was all about, I asked him,

"Question. Have you received any detailed data concerning radar information in Japan?" His answer was,

"Answer. I want to ask you to ask that—say that [53] again.

"Question—" This is at page 146. "Question. Did you receive radar data from Japan?

"Answer. I did not personally. ICAO did.

"Question. Have you seen the radar data?

"Answer. Just what ICAO showed us. Just what ICAO showed us.

"Question. Is that just what is in the ICAO report?

"Answer. Yes.

"Question. Other than what is in the ICAO report, did you receive any information concerning Japanese data—Japanese radar?

"Answer. No. We are getting back on that soft ground again."

The information that he had is entitled, Radar Data of the Japanese Defense Force, and he says he does not have it. Now, I do not know what the real classification of the data that he eventually produced and said is confidential data. Apparently, it was obtained by some Japanese attorney for the family association representing decedents in this case from some member of Parliament, but what we have here, Your Honor, are now more than half truths—less than half truths, Your Honor, I mean, they have—when I asked him if he has any of the documents in his possession, he says no, and then he says they did not have it back when he was doing **[54]** his investigation.

What was it based upon? What was his opinion based upon? What was the ICAO report based upon? I have to go for just a little bit more on this subject with Captain Houston's deposition, Your Honor. I asked Captain Houston on his deposition, page 171, when I got back on the subject of classified data,

"Question. When did you receive this classified data?

"Answer. I can't tell you. I don't remember. This is a lot of time that elapsed."

This is June 16. He got the documents that he now says is classified from Mr. Madole—according to Mr. Houston's affidavit, he got the documents two weeks before his deposition when he tells me, I do not remember. This is a lot of time that elapsed.

"Question. Did you receive the classified data before you got to Boeing?

"Answer. No."

and the question was interrupted.

"Question. —Boeing in November?

"Answer. No.

"Question. Did you receive the classified data while you were at Boeing in November of 1983?

"Answer. Possibly yes.

"Question. Is that a possibly or a probably?

[55] "Answer. Possibly.

"Question. It is possible that you received it after you left Boeing in November of 1983?

"Answer. It could be, yes."

Your Honor, this witness under oath several times suggested that he had this—did not—specifically stated he did not have this information in his possession at the time of his deposition. He suggested very clearly that he had received it back in November of 1983 when he was at Boeing at Seattle, Washington. And at this same time he had just received what he now says his client supplied, two weeks before his deposition in Washington, D. C., not in the State of Washington. Two weeks before his deposition, not six years before his deposition.

Now, Your Honor, this type of thing is going to be coming up again, and that's the only reason why I'm belaboring it, because this permeates the plaintiffs' experts' deposition testimony.

THE COURT: I think most depositions wind up that way and that's because you get sidetracked.

MR. TURNER: Uh-huh. Now that clearly—

THE COURT: He answered the questions that you asked.

MR. TURNER: Are you presently—

THE COURT: If I got him on the stand, I bet you [56] he would—it would all clear up in five questions. All clear up in five questions. He answered the questions that you asked, but when you get in a deposition, you've got other things that you want to get out of a witness and some of these things escape. You know, hindsight is 20-20.

So, as you read it and as you listed it, it all sounds like it is the worst thing in the world. Well, I'm here to tell you it

isn't. I'm here to tell you it isn't. And you can go on ad infinitum and ad nauseum if you want, but I don't think you are going to make your point going through his deposition about whether he had possession of something this week or last week.

You'll see a couple of other questions—possession. Do you know where it is? Who's got it? When is the first time you saw it? Where's it been since? Do you know? Could you have gotten it any time you wanted to? Did you ever refer to it? Blah, blah, blah. Ten or 12 questions like that and it would all—you would all—you would understand that business.

Go ahead, counsel.

He's not through. No.

MR. TURNER: Let's go back to the ICAO report, Your Honor, the two main points which I think are key to it is, as Your Honor pointed out, is there a duty of that body to conduct an investigation?

[57] THE COURT: We don't have any problem with that now, do we?

MR. TURNER: I do, Your Honor, not with—

THE COURT: Well, I don't.

MR. TURNER: —that issue.

THE COURT: Let me just tell you, I don't. I don't. You go on to your next point.

MR. TURNER: Your Honor, I don't say that the organization must have a duty for it to be trustworthy. They certainly do. My point is that ICAO is not in the business of investigating accidents.

THE COURT: Neither is Korean Air Lines.

MR. TURNER: They had to establish a special—

THE COURT: They are not in the business of it. They weren't set up for it, but that's certainly one of their responsibilities. It's not the first time they've ever conducted one and they might not do it the way we do it here, like the National Transportation Safety Board, and all these other outfits. But I will not buy that. So, you go on to your next point.

MR. TURNER: The main point, Your Honor, with regard to the expert testimony. The expert testimony—

THE COURT: Of whom?

MR. TURNER: Houston, Captain Houston.

THE COURT: See, that's what I was asking for. [58] I don't understand. You take the flat position that he has no expertise about which he can testify.

MR. TURNER: No, I don't say that, Your Honor. I say there's not foundation.

THE COURT: Foundation for what?

MR. TURNER: He doesn't—there are no facts that he has disclosed in the course of discovery upon which he could possibly come to any sort of conclusion that is not shear, shear speculation. That's the main point, Your Honor. And I'll refer Your Honor to the Nichols Construction case against Cessna—

THE COURT: I don't need to drag in—I don't need to drag in any other cases. We've got to deal with what is right here.

So, you said if he doesn't talk about the report he has nothing to talk about?

MR. TURNER: Exactly, Your Honor.

THE COURT: That's what I was trying to get from you an hour ago.

MR. TURNER: You should have asked me before.

THE COURT: I didn't ask the follow-up questions. I thought you'd pick up. I thought you were sharp. And it is 10 minutes after 5:00 now.

MR. TURNER: Thank you, Your Honor.

THE COURT: All right. Well, what do you want [59] to do? You want to be heard? I mean, now?

MR. SINCOFF: Whatever your pleasure, Your Honor. I'll be five minutes.

THE COURT: Mr. Sincoff, you are a New York lawyer. No way you can argue in five minutes.

MR. SINCOFF: I'm going to break precedent.

THE COURT: Boy, I'm going to let you break it.

MR. SINCOFF: Thank you for your indulgence, Your Honor.

THE COURT: Would you note that it is now eight minutes after the hour of 5:00 or thereabouts?

MR. SINCOFF: Counsel took 50 minutes. I'll take five. Five minutes, Your Honor.

THE COURT: No, I just want to know if you want to take a break.

MR. SINCOFF: No, Your Honor, I'm fine. In fact, I would like to—

THE COURT: Do you want to take a break? I have to be considerate of all of the participants.

MR. SINCOFF: That takes care of that. I want to take a break, Judge.

THE COURT: Let's take a short break, what, five minutes or something like that? Then we'll come back.

MR. SINCOFF: Does this count against my five minutes?

[60] THE COURT: I haven't got to that stage of the trial yet.

(Recess taken.)

THE COURT: Yes, Mr. Sincoff.

MR. SINCOFF: May it please the Court, I would like to first address briefly the admissibility of ICAO and why this Court should admit it into evidence.

THE COURT: Lock, stock and barrel?

MR. SINCOFF: Lock, stock and barrel.

THE COURT: Okay.

MR. SINCOFF: Because the Supreme Court of the United States last year said you should do so because the Court reversed the lower court which refused to admit into evidence the part of an aircraft accident report which stated the conclusions. The court below it let in the facts but excluded the conclusions, the—

THE COURT: Well, all we are trying to get here are the facts.

MR. SINCOFF: We think the whole thing goes in.

THE COURT: No, let's focus. Let's focus.

MR. SINCOFF: Okay.

THE COURT: Now, let me put it in context. We all agree that the question of trustworthiness is a legal question that has to be determined by the trial court, do we not?

[61] MR. SINCOFF: Conceded.

THE COURT: All right. There's got to be some basis upon which I can make that determination of trustworthiness.

MR. SINCOFF: Agreed.

THE COURT: Does there not?

MR. SINCOFF: Agreed.

THE COURT: So, what we are concerned with, what in the evidence—wherever it came from, Japan, Russia, or anywhere—that is referred to in this report, that sustains any conclusions in the report. Isn't that our problem?

MR. SINCOFF: Yes, Your Honor.

THE COURT: All right.

MR. SINCOFF: Number one, trustworthiness, according to the Supreme Court, is on Korean Air Lines' shoulders. It is their burden. The person objecting to the admissibility of the accident report under 803 of the Federal Rules of Evidence, is the objector. They have the burden.

THE COURT: That's right, and they are trying to carry it by pointing out to me, as they did in connection with this one section—

MR. SINCOFF: Yes, Your Honor.

THE COURT: —2.12.9, that there is no basis in the report for the trustworthiness of conclusions. So, they've tried to assume that burden. I don't think we are [62] arguing about who has got the burden.

MR. SINCOFF: Okay. Number one, trustworthiness, as Your Honor pointed out, partially turns upon who the investigators were.

THE COURT: That's true.

MR. SINCOFF: If these people were not qualified, then you certainly should have a suspicion of trustworthiness.

THE COURT: And we also concede at this point that as far as much of the report, or at least the beginning of the report, we don't have any problems about that, in terms of—

MR. SINCOFF: Okay.

THE COURT: —what they call factuals. Is that correct?

MR. SINCOFF: Their own exhibit, their own Exhibit D, page 148, shows affirmatively that these people who did the investigation were highly qualified experts.

THE COURT: Yes.

MR. SINCOFF: In addition, in addition to the ICAO team, there were representatives from Korean Air Lines, our government--

THE COURT: I don't think that that's the key to it. I think—I don't think there is any argument about that.

MR. SINCOFF: Okay Here is what—

[63] THE COURT: They didn't go around and just pick up any Joe that—

MR. SINCOFF: Okay.

THE COURT: —didn't have anything else to do, and say, give us a report.

MR. SINCOFF: The president of Korean Air Lines says that this is a trustworthiness report. We say—

THE COURT: He is not in the position to make the judgment with respect to trustworthiness, no matter what he says.

MR. SINCOFF: Okay. He is the president of the corporation. He made an admission. We think it is something that you should take into account. Exhibit 283, pages 8-9 they—

THE COURT: No, they—no, no.

MR. SINCOFF: —quote from him. He says it was reliable, objective and authoritative. Korean—

THE COURT: There are some portions of it that are. There isn't any question about that.

MR. SINCOFF: He says the whole report, the final report was reliable, objective and authoritative. That final report was given—excuse me. President Choi of Korean Air Lines, his statements about that report were given to the Korean Air Lines witnesses when they were being prepared for their deposition. That's in the record.

[64] The Korean Airlines' own pilot expert, Captain Parrott, testified that he accepted the factual findings of the ICAO report. The deposition of Parrott is attached to our papers.

THE COURT: We are not arguing about the factual finding.

MR. SINCOFF: The United States Government found it trustworthy.

THE COURT: We are not arguing—Mr. Sincoff, we are not arguing about the factual findings.

MR. SINCOFF: I'm talking about the entire report, Judge.

THE COURT: No. Well, I'm not talking about the entire report.

MR. SINCOFF: All right.

THE COURT: I'm talking about that portion of the report that you believe is crucial, which has to do with these hypotheses, as to what the route was.

MR. SINCOFF: The route was confirmed by the team—

THE COURT: You tell me where in this report you find confirmation of the route, R-O-U-T-E.

MR. SINCOFF: Korean Air Lines itself is confirmation of the route.

THE COURT: The admission of the president?

MR. SINCOFF: Exhibit 94. Exhibit 94 consists of [65] two parts. One part was signed by the KAL insurer's investigator, the very people that are paying defense counsels' bills here.

In addition, that exhibit contains a statement signed by the Korean Air Lines—

THE COURT: I repeat, I repeat, we are not talking about admissions or some insurer's—

MR. SINCOFF: I'm addressing the flight plan.

THE COURT: We are talking about the ICAO report, Mr. Sincoff.

MR. SINCOFF: Yes, Your Honor. And there in that document, it says—

THE COURT: In what document?

MR. SINCOFF: Exhibit 94, which is attached to our opposition to our motion. It says, "Well established evidence shows the aircraft strayed into USSR air space some considerable distance to the right side of its planned flight track."

It further states, "From information received during our inquiries with the insured, KAL, the aircraft flew into USSR air space for some considerable period of time before being attacked."

THE COURT: All right.

MR. SINCOFF: The exhibit, the report itself states the basis of the facts. They had several different pieces [66] of information, all of which coincided with the track depicted on the exhibit which we will offer.

THE COURT: I want you to point out what that was.

MR. SINCOFF: Okay.

THE COURT: Now, let's—

MR. SINCOFF: Number one, they confirmed the place where the wreckage was located by the flight data recorder from this instrument.

THE COURT: All right.

MR. SINCOFF: And they set the coordinates. This flight data recorder had an automatic underwater beacon signal. When the flight data recorder—the plane crashes into water, automatically a signal is sent out. That signal was heard by the rescue vessels. The rescue vessels plotted the exact coordinates where that occurred, and it is set forth in the report, and our chart starts with the place of the crash, the wreckage site.

THE COURT: All right. All right.

MR. SINCOFF: In addition, Korean Air Lines admitted in its own documents, and ICAO also confirmed, there were 700 pieces of wreckage located in the Sea of Japan, near the crash site, and that items of wreckage included parts of human remains. It is stated in the ICAO report The wreckage was identified as having the colors—these were very small pieces, Your Honor has to understand, but Korean [67] Air Lines identified parts of that wreckage as of the same colors of KAL and a Boeing 747.

In addition to that, Japanese civil defense radar, located at Wakenai Island, which is at the tip of Japan, not very far from the place of the shoot-down and the crash, it observed unidentified target which when it went to the crash was identified as KAL flight 7. It saw the track of the airplane crossing Sakhalin Island, from the east, across the Island, before the target disappeared. At the time, the crew of flight 7 was reporting rapid compression, which we think means rapid decompression.

That track, observed by the Japanese, coincided with a portion of the track involving the Japanese—excuse me, the Russian radar. The Russian radar tracked this airplane for two and a half hours. Our country, our country—the exhibit is attached to our papers, if Your Honor wishes me to find it we will, but that—

THE COURT: No, no, no.

MR. SINCOFF: —our Government said that the Russians tracked that airplane by radar for two and half hours before it was shot down, or maybe it was three hours. Now, that is our Government. I could go on and on and on but every document is set forth in our opposition to the motion. We have attached it—it is supposed to be called a brief, but because it is so long it is called a memorandum [68] since it is not brief, and I have used more than my time.

THE COURT: I am not cutting you off.

MR. SINCOFF: I want to be cut off because I think it is clear the ICAO report was prepared by experts with ICAO, and they also brought in experts from around the world including Korean Air Lines, Boeing, Litton, the United States Government, and on and on and on. It was a good committee. They did their work. They came up—they were charged with the duty of coming up with a final report. They came up with a final report.

Our Government commended the report as in the most laudatory form, so I think we sustain a burden we do not have by showing it is trustworthy because every government including the Korean government, the air line—even in its own documents, it showed—Korean Air Lines produced a track of this airplane. It coincides with the one we are going to offer and the same one that is in ICAO. I do not know what burden we have to sustain to show that it is trustworthy, but it clearly was.

As to Captain Houston, just a moment. Everything they said about Captain Houston does not go to the admissibility of his opinions. He is a highly qualified expert and percipient witness both. He did things and he saw things in that ICAO simulation that he can tell us about, and the ICAO simulation that he did confirmed the track of the [69] airplane from

the very beginning when it was over Alaska, which our Government showed it was off course.

That is our Government's radar. That will show the plane was off course from about 10 minutes after takeoff—we want to quibble? Maybe it is 30 minutes after take off—but for five hours, that plane was off course over Alaska, over the Pacific. Based on information from our Government, the Russian radar plot which our Government says was trustworthy and acceptable, two and half hours or more they tracked that airplane. The Japanese defense radar, the place of the crash, and I could go on and on and on. Houston—

THE COURT: And all that comes from testimony including—

MR. SINCOFF: There were Houston—

THE COURT: —Houston and many other sources.

MR. SINCOFF: —Houston will rely on the ICAO report and will also provide as a percipient witness confirmation of what is in that report through the ICAO simulation where he confirms all of this string of information that fits together in a consistent flight path. If they wish to cross examine him upon the things I heard for about 20 minutes, they are welcome to do so.

THE COURT: Not wish. They guess they have an obligation to their client to do it.

MR. SINCOFF: Judge, it has such a simple [70] explanation. I do not think they are going to waste the time of this Court and jury. They have more important things to do with Captain Houston, but it is their privilege.

I am sorry I took more than my allotted time.

THE COURT: No, no, that is all right. You did remarkably well considering that I did not anticipate you would be able to go anywhere near the five minutes.

MR. TURNER: Just a brief response, Your Honor?

THE COURT: Go on. Yes, you may respond.

MR. TURNER: Just, Your Honor, with regard to that exhibit named four, what Mr. Sincoff was referring to was an insurance investigator's report that he submitted in order for the whole claim to be paid to Korean Air Lines. I do not

think that has any probative value and has nothing to do with this case whatsoever.

But just, again, I want to make it clear, Your Honor, this is exactly what the depositions, the discovery in this case has revealed. Mr. Sincoff talking about there is a flight data recorder that emits signals and that the search vessels—

THE COURT: Well, you do not—you are not trying to argue to me that any evidence with respect to where they said they got that is irrelevant—

MR. TURNER: No.

THE COURT: —or incompetent in this case.

[71] MR. TURNER: No, I am not saying it is irrelevant, but I am saying let's just look at it and see what it is, that even the ICAO report for that says they did not receive any location for signals. The language is that there was some intermittent hits for these radio beacons somewhere in the Sea of Japan and not as Mr. Sincoff says, they plotted exact coordinates.

I mean, these are the distortions that we are going to be dealing with, Your Honor. Signals were intermittently received by some search vessels of the United States. However, the recorder was not located in the irregular and very difficult underwater terrain of the Sea of Japan. The coordinates that Mr. Sincoff is talking about is in the next paragraph where it talks about the location of the main wreckage was not determined.

"It was not determined. The search has now been suspended or terminated by all interested parties. The search area consisted of an underwater ridge with an average depth of 200 meters and an area west of the ridge where the depth varies 500—between 500 and 800 meters. The approximate position was," and then they give coordinates for the search area not that any beacons were located, and they plotted the exact coordinates. Not at all. It was somewhere in the Sea of Japan is about as close as we get.

Mr. Sincoff talks about 700 pieces of wreckage [72] being located near the crash site, near those other coordinates. There is nothing—

THE COURT: Well, I think that is all—

MR. TURNER: Okay. You are right, Your Honor.

THE COURT: —we got an approximation. We know it was in the Sea of Japan not in the Atlantic Ocean, so we got them in the right hemisphere.

MR. TURNER: And we know it was not in the Atlantic.

THE COURT: We got them in the right ocean, and we got them near Japan, and it is a logical course that unless they were going somewhere—Siberia or someplace—they were supposed to be going to Seoul, Korea, but that generally is in the direction that they would have been going. On course, off course. You are nitpicking.

MR. TURNER: Okay. But, Your Honor, where is this two and half hours of radar information?

THE COURT: I—

MR. TURNER: That is the point.

THE COURT: —if it is not here, they will not be talking about two and a half hours of radio information. They just will not, and arguments—you know they are—

MR. TURNER: Your Honor—

THE COURT: We do not know. There has never been anything indicated to me that anybody knows with any [73] reasonable degree of certainty the flight path of this airplane for any time—I will say—beyond an hour after it left Bethel. Now, that is a fact.

MR. TURNER: Actually, any place beyond Bethel—

THE COURT: And we do not know with any degree of specificity when it hit the water and where. That is a fact, and we will never know, but what we do know that when it left Anchorage and that it never showed up until the wreckage was found in the Sea of Japan, and we can argue from now until whether it was two hours off course, three hours off course, one hour off course, and they are making a whole lot of it.

I do not see what difference it makes how many hours they were off course except that—especially since there is going to be evidence that show whether they were off course a half hour, two hours, and that assume that there was something wrong with all three of the INS systems, there were other ways that they could have checked. They did for a while with

015. Why they gave the responses they gave, nobody ever knows. What they did with the information they got, we will never know, and they could have—you know—

As I recall the weather report, there were some clear sky before the plane was down. It was not all cloudy as I recall the weather data from that night, so the stars up there, they could navigate by stars. They could look at the ground scope radar. There were other things conceivably that **[74]** were possible, and that will be developed, the alternatives they had, ways that you can navigate, what they should have looked for and presumably did not, or if they did ignored it. That is that they are arguing.

They could have seen all of that and said we are still going to keep on going.

MR. TURNER: Your Honor, our primary objection to the ICAO report really is the opinions and conclusions, this particular—

THE COURT: That is the objection you have to all experts who oppose your point. There is nothing unusual about that. Nothing unusual about it.

MR. TURNER: May we offer suggestions for redaction of the ICAO report, Your Honor?

THE COURT: You just want the 35 pages. That is what you want. You think everything else—

MR. TURNER: Well, there are some of those that I would not be crazy about either, but basically, yes.

THE COURT: You are not crazy about the whole thing. You are stuck with it. You are stuck with it, and it is a tough row that you have to hoe. It is not a question about that, but you are asking me, you know, to just throw out willy-nilly.

MR. TURNER: Well, particularly something that—

THE COURT: The—

[75] MR. TURNER: I am sorry.

THE COURT: Something that what?

MR. TURNER: Something such as that so-called Russian radar line where the report itself makes it clear they have no idea of what the basis for that line is.

THE COURT: And I have indicated to you there is no basis in the report that I can see for any conclusion or hypothesis presented. It will not be presented to this jury. If there is, the jury is going to get it because I do not see the report as being wholly inadmissible. I do not.

MR. TURNER: Thank you, Your Honor. I appreciate your patience.

THE COURT: Oh, I get paid double for patience. Didn't you know?

MR. MADOLE: May it please the Court?

THE COURT: Yes.

MR. MADOLE: Our first witness after opening tomorrow we would propose is captain Houston.

THE COURT: Well, and it will be during the course of his testimony that we are going to get into this report.

MR. MADOLE: Yes, Your Honor.

THE COURT: So I would suggest to you, in light of what I have just said I am going to do, you go through that report very carefully.

MR. MADOLE: We certainly will, Your Honor.

[76] THE COURT: Very carefully, and before he testifies about that report, and maybe you can bifurcate his testimony in a fashion where we can get to know him and hear him and get to a certain point—

MR. MADOLE: We plan to do exactly that.

THE COURT: —and then before you starting going in, well, now, Captain Houston, let me ask you about this report for which you participated as a member of that team, then we are going to declare a recess, and we will go over everything that you are going to ask him about in that report.

Now, it seems that is a logical way to do it.

MR. MADOLE: We understand, Your Honor.

THE COURT: I have no intention of letting everything in that report go in willy-nilly just because I give it some—some parts of it trustworthiness. Those portions that I cannot feel trustworthy about because I do not see anything to sustain it—in the report, not some other deposition, some insurance company report or something from the King of Siberia or something will not get in this case, only those portions that I

can say with reasonable confidence as trustworthy. Because I see a basis for it, it will be admitted.

Now, that is about as—I think that is what I am supposed to do, and that is the way I am going to do it. So [77] you go over the report, and we will get it ironed out, and I would think that between your opening statements you might get into his testimony, a portion of it, but use his testimony in the morning because I have cautioned you. I am not going to sit here and subject this jury to a whole lot of lawyer's talk before they have heard a thing about the case.

Then at the appropriate time, I will declare a recess. We will go over this witness. I am thinking that it will probably come—we might be lucky and be able to do it on the lunch break. Extend the break. Give them—and then we can iron this out, then get the rest of his testimony depending upon how much argument he has about it, but in any event, we are going to do it in that fashion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL 565/Misc. 83-345
Washington, D.C.
July 18, 1989
9:45 a.m.

IN RE: KOREAN AIR LINES
DISASTER OF SEPTEMBER 1, 1983

VOLUME 2
TRANSCRIPT OF TRIAL BEFORE THE HONORABLE
CHIEF JUDGE AUBREY E. ROBINSON, JR.
UNITED STATES DISTRICT JUDGE, AND A JURY

APPEARANCES:

For the Plaintiffs:	DONALD MADOLE, ESQ. MILTON SINCOFF, ESQ. GEORGE FARRELL, ESQ.
For the Defendant:	GEORGE N. TOMPKINS, ESQ. DONALD TURNER, ESQ. DESMOND BARRY, ESQ.
Court Recorder:	Mary Thomas
Transcription Service:	Deposition Services, Inc. 600 East Jefferson Street Suite 103 Rockville, MD 20852 (301) 738-1042

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

[207] * * *

THE COURT: Let us settle on this ICAO report. I guess the best way to start is let them tell us what their problems are, then.

MR. TURNER: Your Honor, if I may? I believe with the mention in his last answer, this witness is about to get into the simulations that occurred at Boeing in the course of the ICAO investigation; and this raises the subject of the analysis section of the ICAO report, Exhibit Number 198. The lack of foundation and lack of trustworthiness for the simulations, as well as the ICAO report—and I think they equally apply for the lack of foundation for this witness to testify concerning the bases of those simulations.

The ICAO report itself makes it quite clear that they had no basis for, because they did not have the Soviet radar data, which they just assumed they had—the simulations themselves, page 44 of Exhibit Number 198 talks about several theories which might explain the error in navigation—were played out on simulators—page 43, which I read to Your Honor a section of yesterday makes it clear that ICAO had no idea [208] of what it was that the Russians had given them to establish any basis for any simulations.

No idea of whether that line that they were provided with may be based on the memory of some unknown radar operator someplace, and it is exactly this assumption of the off-course track of this aircraft following a path that was provided to ICAO in a highly politically motivated report of the Soviet Union.

There is no underlying data. There are no radar tapes, printouts, any sort of data to serve as a basis for the very premise of the simulations. And it does not matter whether it is ICAO that had no basis or this witness that had no basis. Neither one have any basis for establishing where that plane was, once it passed Bethel.

It would be pure prejudice to my client with the jury, if the witness or the hearsay of the ICAO report is permitted into this trial when it is founded on nothing except this line that was provided by the Soviet Union; and no one at ICAO--

and neither does this witness—know what it was based upon. There is no foundation whatsoever, and it lacks trustworthiness.

I might also just point out to Your Honor section of the Air Navigation Commission, which I mentioned yesterday was the technical body assigned by ICAO. They had their technical committee review the Secretary General's report. **[209]** The Air Navigation Commission report is Exhibit 288—in which they say, "The Soviet Union could not accept the visit by the ICAO investigation team tasked to undertake the investigation into the flight and destruction of KE 007. It was stated by the USSR that it was conducting its own investigation. Preliminary information on the progress of this investigation has been presented to the Secretary General by the Minister of Civil Aviation of the USSR. During its review the commission found—" The commission, the Air Navigation Commission of [ICAO], "found some differences between the preliminary information provided by the USSR and other information provided to the Secretary General. It is hoped that further information will be provided by the USSR on completion of its investigation."

Your Honor, there was no radar data provided at that time. There was no radar data provided after that. And the Air Navigation Commission made that statement February 16, 1984—three months after this witness was at Boeing conducting these simulations.

If they did not have it three months later, they certainly did not have it when he was conducting the simulations in Boeing. Thank you, Your Honor.

MR. SINCOFF: Does Your Honor wish me to address **[210]** it, again?

THE COURT: You can do what you think needs to be done under the circumstances? I am going to make ruling. Now, if you do not want to be heard, I will not hear you.

MR. SINCOFF: I cannot take that chance, Your Honor. I will be heard.

THE COURT: I suggest your not taking it.

MR. SINCOFF: Okay. I would like to point out a few things. The statement by Korean Air Lines that they will be

prejudiced by the introduction of the testimony of this witness is true. Every time a witness testifies to evidence which favors one party against the other, there is prejudice. But that is the reason why we have witnesses testifying.

The question is whether it is unfair prejudice. We do not think the percipient witness Captain Houston, who was there, who did the work, who observed the simulation, observed the recording, participated in flying the simulator; as that percipient witness, we believe his testimony should be heard.

We point to Exhibit 703. Seven oh three has two different standards. The first is in the first sentence. It says, "The facts of data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing." That provision, the first provision, literally applies to [211] this witness.

He has the facts. He had the facts upon which he bases the opinion. The rule says it may be those perceived. He did, in fact, perceive. It also talks in the alternative about facts being made known to the expert. The second standard, which is a different one, applicable under Rule 703 of the Federal Rules of Evidence, states that if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

We claim the benefit of that second standard, which is an alternative one. That is, as a qualified expert pilot, he is entitled to rely upon the forming of opinions, based upon facts not admissible in evidence. So, even—

THE COURT: No. I guess you misunderstood. At this juncture, you were going to focus on this report, not the testimony of the witness with regard to the report. We are focusing on the admissibility of the report. When we recessed last night, I was advised that today, sometime before we got into this report, you would have determined—counsel on each side—those portions of the report that you think I cannot receive.

I have told you already, and I will repeat. Some of this report is going before the jury. It is a question of how much. I do not buy the argument, and I will repeat in on **[212]** the record—that the report itself, all of it, is untrustworthy, as it is defined in the context which is my legal responsibility to determine.

So, in that sense, the report—the total report—is not untrustworthy. I am advised, now—or I assume from the argument I have just heard from defense, that the whole report should be excluded. There is no portion of it, even the first 35 pages, which yesterday was conceded presented no problems.

I cannot see the problems, for example, with respect to the first 35 pages, nor can I with what goes on for a considerable period of time. What really concerns counsel are the conclusions—or what is the word they use in the report?

MR. SINCOFF: Analysis.

THE COURT: Analysis. We focused at one time on the analysis of 2.292 or something like that.

2.—29.2—where they said on the one hand could be this; on the other hand it could be that. I had anticipated that in addition to that particular section, there might be others that you could argue to me should be stricken.

I do not think that is of any value to anybody in this case, so that particular—and I will give it to you with exactitude if you want—that is 2.

MR. TURNER: That is 2.12.9.

[213] THE COURT: It is 12.9?

MR. TURNER: Two point, twelve point, nine.

THE COURT: Is that the one we argued about?

MR. TURNER: That was the specific paragraph on page 23, that—

THE COURT: Yes. Now, what other specific paragraph? You don't have any specific paragraphs. You do not want any of it in.

MR. TURNER: Well, Your Honor, that paragraph that establishes the fact that there were no Russian radar data provided upon which any of these simulations or conclusions concerning the off-course can be based.

THE COURT: Now, that has nothing to do, in my judgment, with trustworthiness at all. What it has to do is the value of that, the weight of that; and what it really amounts to it—and you can argue certainly, and will argue, that these—there was no basis for either of these hypotheses that they accepted to do the simulation—so the simulation was just a waste of time.

The[y] took a deviation of 2.265—or whatever that reading was. They said well, let us try it this way. And then they varied it and did it another way. Then they said let us see what happens if we set the things ten degrees east on the ground and did it. What happens if we run it with one simulator and run it with two?

[214] That's the five things that they did in this. That is all set out what they did and what their conclusions were. They cannot come up with anything.

MR. SINCOFF: Well, Your Honor. Counsel stated—at the moment, I think what is happening is that we previously offered—and I will repeat my offer in evidence of Exhibit 198 in its entirety. I gather there is an objection, and I gather the Court has some question as to what the ruling is. In the alternative—

THE COURT: No, no, no, no. I know what the ruling is.

MR. SINCOFF: I am sorry. I do not.

THE COURT: I will repeat it for you. The report will not be rejected in its entirety by virtue of any finding that I make that it is not trustworthy.

MR. SINCOFF: So, therefore—

THE COURT: There is one provision—2.12.9—am I right?

MR. TURNER: Two point twelve point nine.

THE COURT: Yes. Two point one two point nine on page 43. That will be stricken. The jury will know nothing about that. Now, that does not satisfy them, because the predicate is—and I have tried to explain this and I will say it again—but unless there is verifiable data that this witness or some other witness can examine with respect to the **[215]** alleged information that they got from Russians, from the Russians, that the report cannot be received.

That is what you are arguing. Well, I have some new[s] for you. I understand your argument, but your argument is not well taken. I have read this report a couple of times, and I went through it again last night. There is no question but what the report did not produce, with any certainty, what had been anticipated when they convened the group, and for a variety of reasons.

They just could not come up with the answers that they were looking for. When we cut off our search, and we cut off their search, and we could not get any further information out of the Russians or anybody else, that was the end of it. And that was reported back to the conference. And that is where it stands.

Some of the—much of this material, you know, is not in dispute—what they had to rest and all that kind of business. You really cannot make anything out of that, because if you could you would have talked about they sat up and drank all night or played cards or something and that is why they did not know what they were doing.

But the report is going on with the exception of 2.12.9. Now, if I have understood your argument, you have another legal argument to make; because if I do not understand what you have made, I will hear you.

[216] MR. TURNER: Well, I do think, Your Honor, that what should be excluded is every section that is based upon the so-called Soviet data which it is—

THE COURT: All right.

MR. TURNER: —2.12.9—

THE COURT: Yes, and what else?

MR. TURNER: —shows there is no foundation.

THE COURT: All right. You are beating a dead horse now. I told you that 2.12.9 is not in. Move onto another one. This is what you were supposed to do at the outset.

MR. TURNER: It is all of Appendix F, the Russian report.

THE COURT: What are you talking about? About Appendix F.

MR. TURNER: Appendix F to the ICAO report, Exhibit 198, is the Russian report in which there is radar data, no coordinates, nothing of that—

THE COURT: So what conclusion does the committee reach as a result of that?

MR. TURNER: It is that report that provides those straight lines.

THE COURT: What straight lines?

MR. TURNER: The straight line that all of the simulations were based upon. The straight line that all the [217] Soviet—

THE COURT: So that is what I am telling you. It goes to the weight of it. It is not worth the paper it is written on, and that does not make it untrustworthy in the legal sense. That is a determination of—a factual determination to be made that this jury will make.

MR. TURNER: Your Honor, it is—it just happens to be, that is paragraph 2.12.9, which I want in because it is that paragraph that shows that there is no foundation for anything else here.

THE COURT: You have just argued to me yesterday that you—that was the one thing you pointed out to me there was no basis for it.

MR. TURNER: It was—

THE COURT: And I told you then, and I repeat, you can wear them out with it. That is what cross examination is all about. That is why I tell you the essence of it is what is this report really worth? What is this report really worth? And you might convince the jury that it is not worth the paper it is written on, but I am not going to throw the whole report out just because they might believe that in this particular case.

MR. TURNER: If I may, Your Honor. It is that paragraph which is the best evidence in this entire case, that the entire report is based—

[218] THE COURT: No, I disagree. I disagree. I disagree. I absolutely disagree.

MR. TURNER: I want that paragraph in. We consent—

THE COURT: Then you will get the whole—you will get the whole report. You will get the whole report, and you can chew it out and spit it out with this witness or any other witness who had anything to do with it because we are going to find out what he had to do in this investigation anyhow. We

will get the whole report, so you just—I understand it is a little warm in here because I will try to get it cooled down.

I must tell you that we try very hard to keep this courtroom comfortable, but I do not control the engineer downstairs, and this is a GSA supervised and operated building, and we will go and beg for comfort and maybe we will get it and maybe we will not, and if it goes up to 100 degrees, I will tell you now, dress lightly, very lightly. No guarantee that we are going to have air conditioning.

No, it is going in. Wear it out.

MR. SINCOFF: Offer 198, Your Honor.

THE COURT: Well, those things are received before the jury. All witnesses are offered and received by the jury. Entered.

MR. TURNER: Objection, Your Honor.

[219] THE COURT: Yes, your objection is noted. The record is clear that you object. The record is very clear, and your reasons are stated, both in your memoranda and your argument, so this will be star number one for the powers that be. All right. Let's proceed. Have the jury come in, please.

* * *

[220] MR. SINCOFF: May it please the Court at this time, I would like to formally offer Exhibit 198, the ICAO report, into evidence.

THE COURT: All right. It will be received over the objections stated and argued.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5415
September Term, 1990
CA 83-0345

Filed July 5, 1991

CONSTANCE L. DUPRÉ *Clerk*

IN RE: KOREAN AIR LINES
DISASTER OF SEPTEMBER 1, 1983

BEFORE:

MIKVA, *Chief Judge*,
BUCKLEY and THOMAS, *Circuit Judges*.

ORDER

Upon consideration of appellant's petition for rehearing, filed June 5, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRÉ, *Clerk*

BY: ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL 565
Misc. 83-0345
All Cases

Filed August 3, 1989

IN RE: KOREAN AIRLINES
DISASTER OF SEPTEMBER 1, 1983

JUDGMENT ON THE VERDICT
(For Plaintiffs)

This cause having been tried by the Court and a Jury, before the Honorable Aubrey E. Robinson, Jr., judge presiding, and the issues having been duly tried, the Jury finds the answers to the special interrogatory questions submitted as follows:

1. Do you find from the evidence that on August 31-September 1, 1983 the flight crew of KOREAN AIR LINES Flight No. KE007 committed "wilful misconduct" as I have defined that term for you? YES

2. Do you find that the "wilful misconduct" of the flight crew of KOREAN AIR LINES Flight No. 007 was a proximate cause of the shootdown by the Soviet military? YES

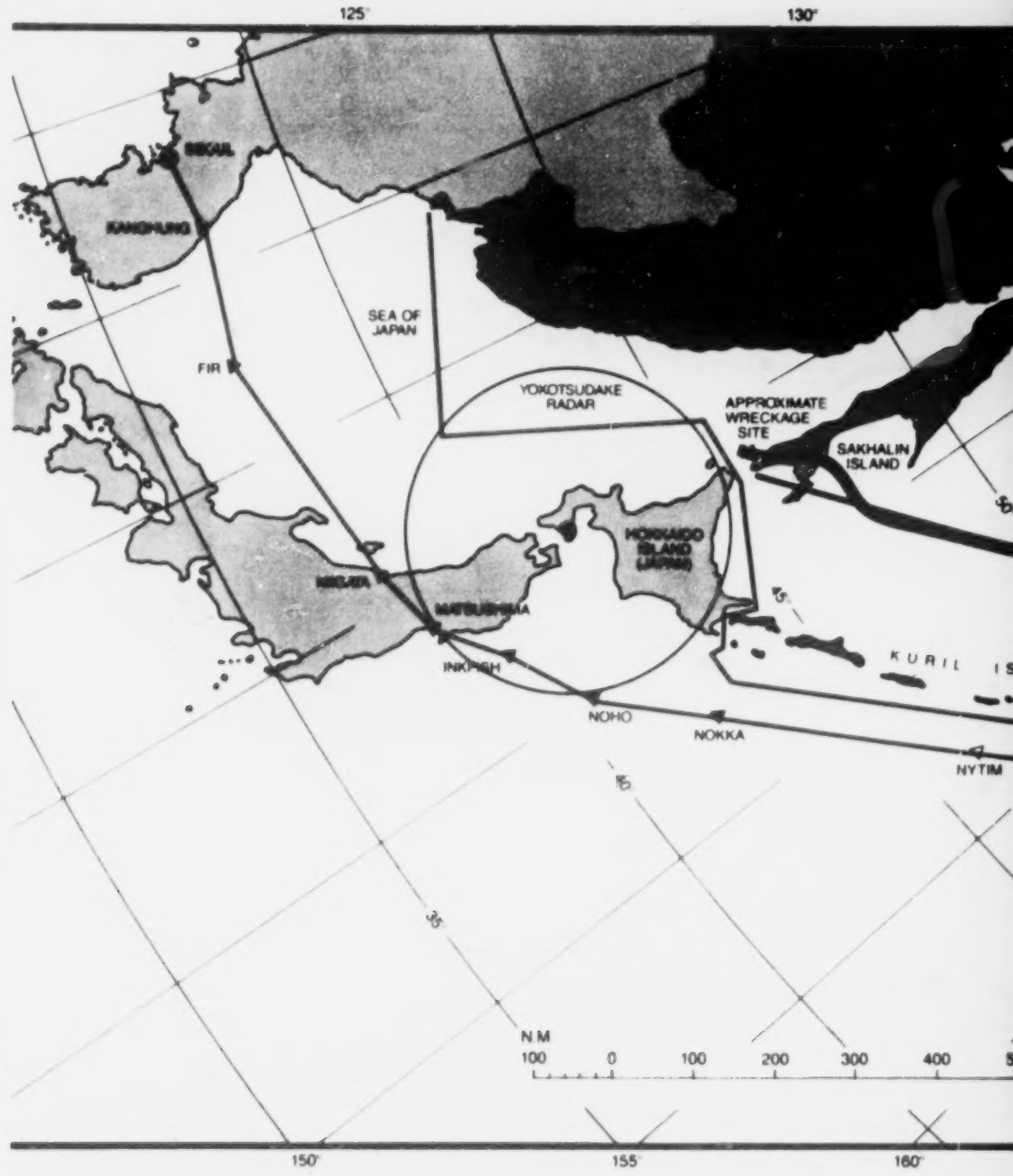
Now therefore, pursuant to said answers, and by its determination, as stated in a supplemental verdict, the Jury finds that plaintiffs are entitled to punitive damages in the amount of FIFTY MILLION DOLLARS ($50,000,000.00).

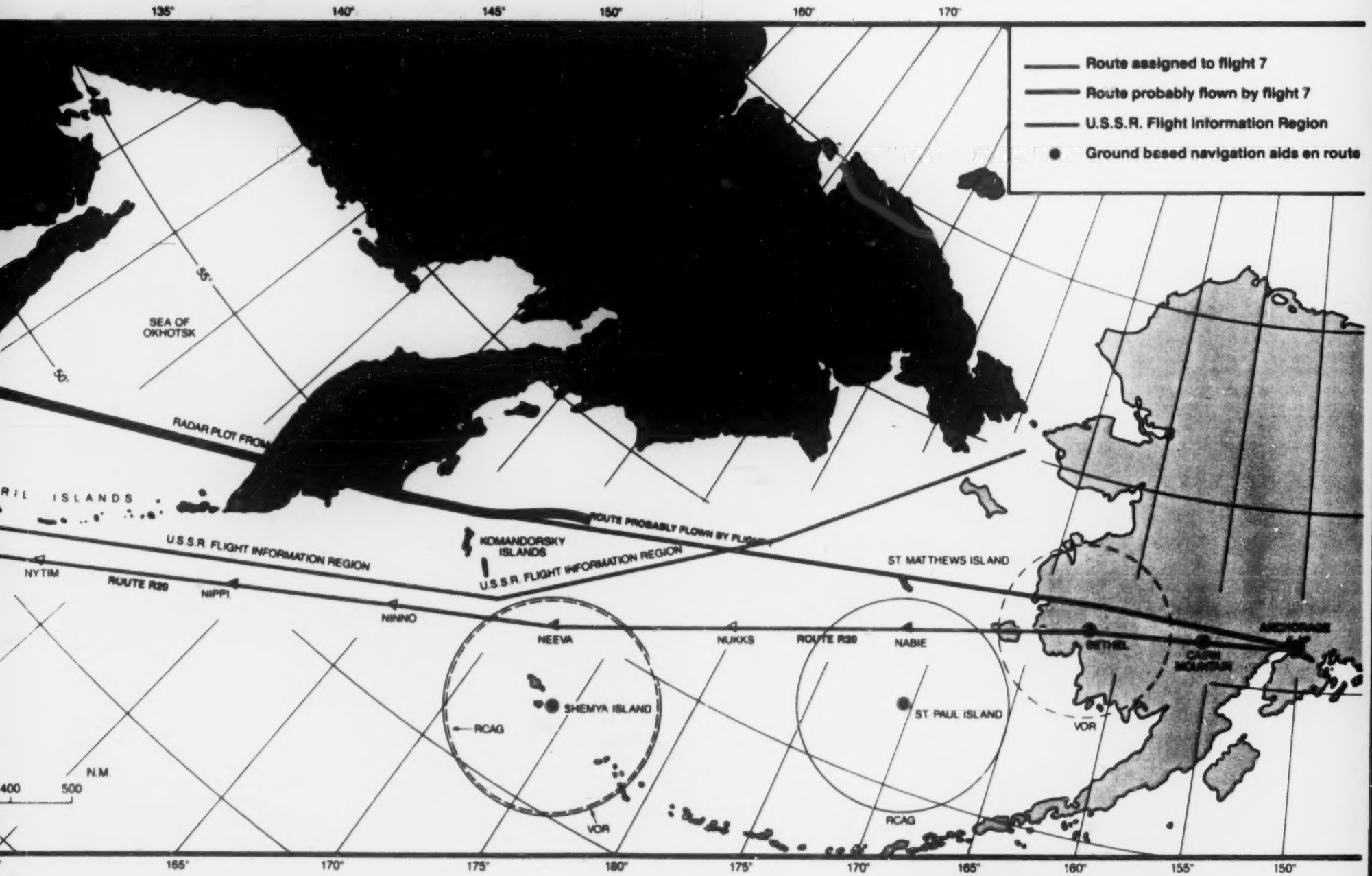
JAMES F. DAVEY, *Clerk*

Dated: August 3, 1989 By: LINDA L. ROMERO
Linda L. Romero

APPROVED: AUBREY E. ROBINSON, JR.
United States District Judge

[*See map on opposite page*]





PLAINTIFF'S EXHIBIT 107-B FID

DEFENDANT'S EXHIBIT 107-B 6/21/89